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ETHICS IN GOVERNMENT ACT AMENDMENTS OF 1982

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2059

TO CHANGE THE COVERAGE OF OFFICIALS AND THE STANDARDS FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR IN THE SPECIAL PROSECUTOR PROVISIONS OF THE ETHICS IN GOVERNMENT ACT OF 1978, AND FOR OTHER PURPOSES

APRIL 28, 1982

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ETHICS IN GOVERNMENT ACT AMENDMENTS OF 1982

WEDNESDAY, APRIL 28, 1982

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The subcommittee met at 9:40 a.m. in room 3302 of the Dirksen Senate Office Building, Hon. William S. Cohen (chairman of the subcommittee) presiding.

Present: Senators Cohen, Levin, Rudman, and Eagleton.

Staff present: Susan M. Collins, staff director; Mary Berry Gerwin, counsel; Frances C. de Vergie, chief clerk; Anne D. Demers, assistant chief clerk; Barbara D. Savage, minority counsel; Marvin S. Putnam, intern.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. The Oversight of Government Management Subcommittee is going to consider S. 2059, the Ethics in Government Act amendments of 1982. This bill, which I introduced on February 3 of this year, would amend the special prosecutor provisions of the Ethics in Government Act of 1978 to better insure independent investigations of high-ranking Federal executive branch officials and to remove inequities in the present law. I'm pleased to have two distinguished members of the subcommittee, Senator Levin and Senator Rudman, as cosponsors of this legislation.

The special prosecutor provisions were established in the wake of Watergate to assure the public that high-level executive officials would be investigated fully and fairly for crimes they may have committed and that the investigations would be conducted free from political favoritism or bias.

The act requires the Attorney General to conduct a preliminary investigation whenever he receives specific information that any official designated by the law has violated a Federal criminal law.

At the close of this limited investigation, unless the Attorney General concludes that absoluely no further investigation or prosecution is warranted, a special prosecutor must be appointed to conduct an independent investigation of the charges and, if necessary, to proceed with the prosecution of the official.

There has been substantial criticism of the Ethics Act since its passage. Critics have argued that the act is unfair, unjustly bur-

dens public officials and is costly to both the Government and the official involved.

To evaluate these concerns, the subcommittee last year held 2 days of oversight hearings on the law at which we heard testimony from both its strong supporters and its critics. S. 2059 would implement recommendations which we made as a result of that investigation and those hearings.

S. 2059 retains the basic structure of the current law because the subcommittee concluded that dangers of conflict of interest were not unique to Watergate, but rather are inherent in our system of government.

As a political appointee of the President, a close adviser to the President and part of an administration which hopes to gain political success, an Attorney General may be placed in a difficult situation when investigating allegations against a senior executive official.

Even when such an investigation is truly handled impartially, the public may doubt that it was if the official was cleared by the Department. In other cases, the Attorney General may "bend over backwards" and prosecute an official when prosecution is not warranted, just to avoid the appearance of political favoritism.

When such conflicts of interest exist, or when the public perceives that there is a conflict, public confidence in the investigation of public officials is eroded, if not totally lost.

By providing a special prosecutor to conduct impartial and thorough investigations of officials, the present law guards against conflicts of interest and guarantees that public officials are not above the law.

An endorsement of the special prosecutor process does not mean, however, that the present law is perfect. To the contrary, our investigation and hearings revealed that there are substantial weaknesses in the Ethics Act.

The foremost problem is that the law has created unfairness by imposing a stricter application of criminal law on public officials. This inequity results from the very low standards for triggering a preliminary investigation and for appointing special prosecutor.

These standards leave the Attorney General little practical opportunity to dismiss even frivolous allegations without seeking a special prosecutor. This process subjects officials to exhaustive, costly, and lengthy investigations in cases which would not ordinarily be pursued against private citizens.

The subcommittee also concluded that the coverage of the present law is flawed. The act does not cover persons who create great dangers of conflicts of interest—the President's family—yet at the same time it covers persons who present very little realistic dangers of conflict; for example, mid-level executive officials and officials who have long since left public service.

S. 2059 would correct these and other problems in the present act. First, the bill would raise the standard which triggers a preliminary investigation so that the Attorney General could consider the credibility of the accuser in deciding whether to pursue an allegation.

Second, the bill would raise the standard for appointment of a special prosecutor from the very low threshold of "so unsubstanti-

ated that no further investigation or prosecution is warranted" to one requiring appointment when the Attorney General finds reasonable grounds to believe that further investigation or prosecution is warranted.

In determining what reasonable grounds exist, the bill directs the Attorney General to consider the factual conclusions of the preliminary investigation as well as the prosecutorial guidelines of the Department of Justice with respect to the enforcement of criminal laws. These changes will enable the Attorney General to screen out allegations which would not ordinarily be prosecuted, while sending serious cases to the special prosecutor.

Third, the bill would amend the law so that coverage more closely reflects those instances in which the greatest dangers of conflict of interest exist. It would restrict coverage to only those officials who occupy top-level executive positions close to either the President or the Attorney General.

S. 2059 would also limit the number of campaign officials governed by the act and would extend coverage to members of the President's family.

And finally, the legislation would limit and standardize the length of coverage of officials, so that all executive officials are covered for the incumbency of the President under which they serve, plus 1 year.

Other changes would make the present law less burdensome to both the Government and the subject of a special prosecutor investigation.

The bill would change the name of the special prosecutor to "independent counsel" to remove the Watergate connotation from the investigation and would authorize the court to award attorneys' fees to the subject of a special prosecutor investigation if those fees would not have been incurred by a private citizen in similar circumstances.

Additional provisions would check the potential for abuse of power by the independent investigator by requiring him or her to follow the prosecutorial guidelines of the Department of Justice and by allowing the removal of the independent investigator for "good cause."

And finally, the bill would extend the special prosecutor provisions, which would otherwise expire in October 1983, for 5 years after the date of the enactment of this legislation.

The special prosecutor provisions of the Ethics in Government Act should be maintained to insure independent, unbiased investigations and prosecutions of criminal wrongdoing by our public officials.

There are, however, serious deficiencies in the present law which Congress has to address. Far from diluting the present law, S. 2059 would substantially improve the special prosecutor process by making it fairer and less burdensome. In this way we can better guarantee that both public officials and private citizens are treated impartially, and equally, under the law.

Today we will hear testimony on S. 2059 from experts on the special prosecutor law. First, we will hear from Associate Attorney General Rudolph Giuliani, who will present the views of the Department of Justice.

We will then receive testimony from former Attorney General Elliot Richardson and former counsel to President Carter, Lloyd Cutler, whose expertise in the executive branch will provide valuable insights into the need to reform the present law.

Finally, we will hear from Robert Evans, representing the American Bar Association which has long been a supporter of the Ethics Act.

Now that diplomacy seems to be in vogue today, I should point out that we have two witnesses testifying against the bill and two witnesses testifying in favor of it. And so I'm looking forward to hearing the witnesses this morning.

Before calling Mr. Giuliani I will turn first to Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good morning, Mr. Chairman.

Last year the subcommittee, under the strong and able leadership of Senator Cohen, held 2 days of hearings on the Ethics in Government Act of 1978.

I stated then that the special prosecutor provisions must reflect our best efforts to balance two competing public interests to insure that persons in high offices were prosecuted for their crimes without political favoritism and to insure that these same persons are not unfairly prosecuted because of their position.

Government needs credibility to govern well, and we must guard that credibility well. It is precious, and public approval for support of Government depends on the certainty that persons in high offices are treated no better than anybody else. Our love for individual liberty and equal protection under the laws requires that we not create needlessly discriminatory and disparate treatment of these officials.

Senator Cohen has already summarized the changes that he, Senator Rudman, and I proposed to make to the existing statute. Those changes address our concerns about the needless stigma and costs attendant to the mere appointment of a special prosecutor and try to insure that a public official would not be prosecuted for a crime for which an average citizen would not be prosecuted.

The changes that we have offered, as enumerated by Senator Cohen, do not weaken the act's original intent or purpose; at least they are not intended to do so.

In proposing these changes, we have not lost sight of the matter of critical importance: the need for independent and untainted investigation and prosecution of criminal allegations against high public officials.

What we have attempted to do, rather, is to learn from the actual experience under the existing law, from those who have been on both sides of the process as it now works, and fashion amendments which improve the fairness necessary to meet the second public interest requirement that I mentioned.

Today we will hear a group of impressive and distinguished witnesses. At this time we seek the benefit of their experience in examining the specific proposals that we have recommended and in refining our recommendations where necessary, and I look forward, along with my friends and colleagues, Senator Cohen and Rudman,

to the testimony and discussion which follow. I know we're going to benefit from the testimony today.

Senator COHEN. Thank you, Senator Levin.

Mr. Giuliani, we're pleased to have you with us this morning and, if you can, we would appreciate your summarizing your statement. It will be entered into the record in full.

Please proceed.

TESTIMONY OF RUDOLPH W. GIULIANI, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. GIULIANI. Thank you, Mr. Chairman, Senator Rudman, Senator Levin. It's a great pleasure for me to be here this morning.

Last year's session I thought was one of the very best appearances that I have had before the Congress because of the nature and quality of the questioning, and I hope that we can be helpful with our suggestions this morning.

As a result of the subcommittee's hearings, this very able subcommittee and its hard-working staff developed S. 2059. The Attorney General and the entire Department of Justice join me in complimenting the subcommittee and its staff on its diligent and sustained efforts addressing the problems presented by the special prosecutor provisions.

Nevertheless, Mr. Chairman, our further experience over the past year has confirmed the Department's views concerning the constitutionality of, and the ultimate rationale for, the special prosecutor provisions.

Therefore, while acknowledging the hard work and laudable efforts of this subcommittee, the Department of Justice opposes S. 2059 as it would oppose any bill which would mandate the appointment of a special prosecutor in particular cases.

At the same time, we recognize that there may be cases in which the appointment of a special prosecutor may be appropriate. Therefore, we further recommend that Congress amend the special prosecutor provisions to permit the Attorney General to appoint a special prosecutor whenever he determines that the Department of Justice investigation would create a significant appearance of a conflict of interest.

Such an approach would provide the flexibility necessary to deal with varying factual situations and personal and political relationships as they arise. Further, it returns the prosecutive function to the executive branch of the Government and to the Department of Justice and affords the Department the opportunity to demonstrate its ability to handle sensitive cases in an appropriate manner.

We have serious concerns about the wisdom and policies underlying the special prosecutor provisions. Existing law and S. 2059 both rest upon the presumption that the department of Government charged with the duty to investigate and prosecute all Federal crimes cannot be trusted to investigate and prosecute certain cases and certain individuals.

To the extent that we, as a government, require the appointment of a special prosecutor in particular cases, or for the investigation of particular individuals, we erode public confidence in our sys-

tem's regular processes, and we forgo opportunities to rebuild the confidence of a skeptical public.

The special prosecutor provisions and S. 2059 remove certain sensitive cases from the existing system and erect an elaborate alternative system for investigating and prosecuting those cases. In so doing, the special prosecutor provisions necessarily undermine public confidence in the ability of the Attorney General and Department personnel to carry out their primary responsibilities in all cases.

This is the fundamental flaw in any legislation which mandates the appointment of a special prosecutor in certain cases. Such legislation institutionalizes distrust of the system by creating an irrebuttable presumption that existing processes are incapable of performing properly in sensitive cases.

In the long run, such legislation cannot achieve its goal of bolstering public confidence in the ability of prosecutorial officials. Special prosecutors may enhance the credibility of a prosecutive decision viewed in isolation, but that credibility comes only at the expense of the long-term public skepticism which we nurture through an ironclad rule disqualifying those individuals who make every other Federal prosecutive decision in this Nation.

The existing special prosecutor provisions go well beyond the historic need for a tool to be used in extraordinary cases.

We recommend legislation creating a discretionary, not a mandatory, mechanism for appointing a special prosecutor. Such legislation would satisfy the needs of the system without erecting a constant barrier to rebuilding public confidence in the Department of Justice.

Like many legislative schemes enacted over the years, the special prosecutor provisions and S. 2059 respond to a valid and important problem. But that response is so broad, so general and so mandatory that the legislation goes well beyond the problem it sought to address and creates numerous additional problems.

Americans are expected to accept decisions of the Department of Justice with respect to crimes committed by society's lowliest members. We cannot long expect them to do so if the Department is not trusted to make similar decisions for society's loftiest members.

Because the special prosecutor provisions institutionalize distrust of those officials who normally and regularly conduct criminal investigations and prosecutions, the special prosecutor provisions in the long run damage the public interest and are bad public policy.

The current special prosecutor law permits the judicial appointment of an officer who performs purely executive functions and who may not be removed by the Attorney General or the President except for extraordinary impropriety. In effect, the special prosecutor provisions remove the responsibility for enforcement of the Federal criminal laws from the executive branch and lodge it in an officer who is neither appointed by, accountable to, nor save in extraordinary circumstances, removable by the Attorney General or the President.

This officer, moreover, may set his own prosecutive standards, investigate, try and appeal any case and take any legal position in the name of the United States without the consent of the President, the Attorney General or the Solicitor General.

In form, the special prosecutor is an officer of the Department of Justice. In reality, he exercises executive functions in a manner wholly independent of the Department of Justice or the executive branch.

Such a role is difficult to square with the fundamental design of the Constitution. In effect, Congress has created a fourth branch of government without amending the Constituton.

The Supreme Court has never upheld an act of Congress which prevented the President from discharging officers who perform purely executive functions.

In our view, S. 2059 ameliorates some, but not all, of the constitutional concern surrounding the appointment and the removal provisions of the special prosecutor law.

Section 6(d) of the proposed legislation would make the special prosecutor removable by the Attorney General for good cause. This is a welcome amendment which we support.

Such a removal standard would make the special prosecutor no more independent than officers of the many so-called independent agencies in the executive branch and would, in all likelihood, insulate the legislation from constitutional attack in that respect.

The proposed legislation, however, would work no change in the procedure by which a special prosecutor is appointed. This leaves the legislation open to constitutional attack on the ground that it violates principles of separation of powers.

Therefore, we recommend that the subcommittee amend S. 2059 and current law to provide for Attorney General appointment of the special prosecutor. Coupled with the removal for good cause as we understand that term, this should eliminate virtually all constitutional doubt about the legislation.

S. 2059 embodies a number of amendments which would more precisely achieve Congress original intent and which would make the procedures under the special prosecutor provisions more equitable. Therefore, if Congress decides to retain a mandatory special prosecutor mechanism, we would ask Congress to consider our position on a number of the changes made by this bill.

Section 2 of S. 2059 would change the title of the special prosecutor to independent counsel. A number of the witnesses at the subcommittee's 1981 hearings endorsed such a change. The Department agrees that such a change is appropriate and necessary.

Current law is at once overinclusive and underinclusive with respect to the persons who are covered by the special prosecutor provisions.

To remedy the situation the Department recommended last year, and we recommend once again, the flexible approach outlined above under which the Attorney General may appoint a special prosecutor whenever he determines that Department of Justice investigation would create a significant appearance of a conflict of interest.

Section 3 of S. 2059 however would work several improvements over present law. Section 3(a) would narrow the coverage of officials in the Executive Office of the President from level IV of the executive schedule to level II. In effect, it would narrow the coverage of middle-level White House executives by about two-thirds.

The Department believes that this provision appropriately narrows the coverage of the legislation.

Section 3(b) dealing with covered officials in a President's campaign committee would cover only the chairman, the treasurer, and any officer exercising authority at the national level. Although this last term may create problems of definition, section 3(b) would improve the legislation.

We suggest, however, that 3(b) be modified so that these officials are covered only while serving as campaign officers. Once they cease such duties, we perceive no reason to remove an investigation from normal procedures in the Department of Justice.

We find section 3(c) troublesome, and we oppose its enactment. Section 3(c) would extend the legislation's coverage to the President's spouse, the President's children and their spouses, the President's parents, brothers and sisters and their spouses during the incumbency of the President.

There is no reason to believe that an investigation of one of these relatives of the President will always give rise to the appearance of conflict. These relatives would unnecessarily be subjected to the burdens and the stigma of special investigation and prosecution.

We believe this proposal is far too inflexible and will not materially aid in achieving the intent behind the special prosecutor provisions. This problem, as well as S. 2059's failure to attempt to deal with close friends or business associates of the President, presents yet another reason for adopting the flexible approach we have recommended, under which the Attorney General in his discretion would appoint a special prosecutor for any of these individuals if appropriate in the particular case.

Section 3(d) also addresses a concern we voiced last year about the duration of the legislation's coverage. The proposed change would decrease the covered time period but does not eliminate some of the problems engendered by existing law.

The proposed change would still leave a person covered for almost 9 years after he leaves office. We perceive little reason for such lengthy coverage. Moreover, an official need not be covered if the opposing party is in office.

We recommend that current law be amended to retain coverage for 1 year after a person leaves office, but only during the incumbency of the President who appointed him.

Our recommendation would also solve the problem presented by Department officials who hold over in a new administration for a few days or weeks so as to assure a smooth transition for incoming new officials.

By covering an official beyond the term of the President he serves, S. 2059 would cover these holdovers well beyond the term of the President they actually served.

This makes little sense and may well discourage officials from assisting an incoming administration during a transition period. Moreover, there is absolutely no reason to suspect that an appearance problem would arise should a current Department of Justice find it necessary to investigate allegations of wrongdoing by such a holdover.

Under present law the Attorney General must conduct a preliminary investigation upon receipt of specific information of the com-

mission of a Federal criminal offense by a covered person. Under S. 2059 instead of specific information, the proposed trigger would be information sufficient to constitute grounds to investigate. This change would permit the Attorney General to consider the credibility of the allegations and of the person making the allegations, as well as the degree of specificity of the information. We support this change.

Present law allows 90 days for a preliminary investigation and we recommended last year that Congress lift this time limit. S. 2059 would permit a 60-day extension upon a showing of good cause by the Attorney General. Although the Department believes that a less rigid time period is desirable, the proposed change would substantially improve existing law.

The present statute requires the appointment of a special prosecutor if, after the preliminary investigation, the Attorney General cannot find that the matter is so unsubstantiated that no further investigation or prosecution is warranted. Under S. 2059, appointment is required only where the Attorney General finds reasonable grounds to believe that further investigation or prosecution is warranted. In making this determination, the Attorney General may refer to written policies of the Department of Justice. These proposed changes should rectify many of the problems in the existing law.

S. 2059, however, requires the Attorney General to comply with written policies of the Department when deciding whether further investigation or prosecution is warranted. Many of the Department's specific prosecutive policies, however, are not set forth in writing, nor should they be. For example, there is no formal written policy precluding the prosecution of extremely minor thefts of Government property such as the theft of a pen or an envelope, or the prosecution of the possession of a small quantity of marihuana. Nor would it be appropriate to set forth such policies in writing unless we are to sanction the commission of petty crimes and restrict the necessarily flexible exercise of prosecutorial discretion. Nonetheless, unwritten policies do exist, subject to exceptions for aggravated circumstances.

We do not believe that S. 2059 would preclude reference to established unwritten policies. However, if the amended statute were so construed, covered individuals would still be treated substantially differently than other citizens. Therefore, the language of S. 2059 should be amended by changing the term "written policies" to "existing policies" or "established policies."

Section 6 of S. 2059 would clarify two important issues and would make one improvement in existing law. Section 6(a) would explicitly permit the special prosecutor to consult with the U.S. attorney for the district in which the violation is alleged to have occurred.

Section 6(b) would direct the special prosecutor to comply with the written policies of the Department except where not possible.

Section 6(c) makes clear that the special prosecutor has full authority to dismiss matters within his jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written policies of the Department.

These changes will help assure that covered officials are treated no differently from other citizens. By explicitly conferring upon the special prosecutor the same discretion and obligations imposed on all other Federal prosecutors, section 6 should provide the foundation for that fairness and uniformity which are critical to public acceptance of investigative and prosecutive decisions.

The subjects of special prosecutor investigations have incurred substantial financial burdens. The present statute makes no provision for reimbursement of attorney's fees. Under S. 2059 the court may, in certain cases, award reimbursement for the attorney's fees incurred by a subject of a special prosecutor investigation.

In our view the reimbursement provision is neither necessary nor appropriate if the special prosecutor provisions are amended in other respects to eliminate the unfairness which can prevail under current law. S. 2059 is designed to assure that Government officials will not be subject to an application of the criminal laws any more rigorous than that which would apply to other citizens. Therefore, if Congress enacts S. 2059 subject to the changes that have been recommended, there is no justification for reimbursement of a subject's fees. No other criminal suspect or defendant is allowed attorneys' fees under U.S. law. It is unfair in both appearance and in fact to provide attorneys' fees for a select group of high-ranking public officials.

If the amended statute is properly applied, the precondition for granting of fees—that the legal expense would not have been incurred but for the requirements of this chapter—will never be present. In light of the other proposed changes to existing law, this provision is both unnecessary and inappropriate.

Mr. Chairman, I trust that the foregoing was helpful to the subcommittee, and I am ready to answer any questions you may have.

Thank you very much.

Senator COHEN. Thank you very much, Mr. Giuliani.

I'd like to discuss your statement about the Attorney General's right to discretionary authority to determine when "significant conflict of interest" exists.

What do you mean by "significant?" What would be significant?

Mr. GIULIANI. Anything other than a very technical possible conflict. Maybe the word "substantial" or "real"——

Senator COHEN. Let me use the case of Richard Allen. For example, let's say that the allegation concerned the First Lady. Would that be a significant conflict of interest?

Mr. GIULIANI. Yes.

Senator COHEN. And yet you don't want the President's family to be covered?

Mr. GIULIANI. What we oppose is the mandatory coverage of the President's family.

Senator COHEN. Well, let's go on then from Mrs. Reagan. What if it were the daughter of the President?

Mr. GIULIANI. I think an Attorney General should have to assess that and determine how close that person is to the President and whether it would really raise a conflict of interest.

Senator COHEN. Well, you have an Attorney General who's a very close friend of the President of the United States, correct?

Mr. GIULIANI. Yes; the present Attorney General was the President's lawyer for 18 years.

Senator COHEN. Right. So, we assume there's a fairly close personal relationship there.

Assume that an allegation was made which either affects the President's wife, his daughter, his son, or perhaps the President's brother.

In any of those cases, would you not agree that there would be a significant conflict of interest if the Attorney General were to go forward and prosecute or investigate Maureen Reagan or the President's brother or son? Would that be a significant conflict?

Mr. GIULIANI. It really depends on who the Attorney General is, what his relationship is to the President.

If we assume an Attorney General who was the President's lawyer for 18 years, that adds something to the equation. On the other hand——

Senator COHEN. Is there room for discretion, in your judgment, in that case as to whether or not there is a conflict of interest?

Mr. GIULIANI. Yes; there should be room for an Attorney General to exercise discretion, particularly with regard to a child who doesn't live at home and has not lived at home for a long period of time.

With regard to a brother or a sister, there should be discretion for an Attorney General to make that decision, and we should permit him to make it and then be subjected to criticism if he makes it in a way that's perceived as being incorrect.

Senator COHEN. We had that situation with the former Attorney General in the Carter administration, who was also very close to the President. It doesn't seem to be an exception, but rather a normal application: Someone who's close with the President, advises him, works with him in the past, someone's in a position to pass judgment on a family member I think automatically it creates a conflict. If not a natural conflict, then it creates the appearance of a conflict which this bill is designed to address.

Let me go on.

Can a special prosecutor bill be of benefit to the accused in your judgment, rather than a burden upon the Justice Department? Rather than an institutionalization of distrust, has it ever worked to benefit the accused?

Mr. GIULIANI. I believe it is devastating to an accused, even to an accused who was so-called cleared at the end of it.

And I think that, having spoken to several attorneys and having myself spent 4 years doing some criminal defense work, I can't imagine a situation in which I would want a special—particularly the title—a special prosecutor to have to be appointed to investigate my client.

Senator COHEN. All right.

Mr. GIULIANI. It gives a great deal of credibility at one point and in a very dramatic way in the press and in the media to the allegations against your client.

Somehow in these situations, even independent of special prosecutor investigations, the fact that the person was cleared 7 months, 8 months to 1 year later is a much less significant fact and for many years you carry the stigma and burden of having been

investigated by a special prosecutor, when, in fact, the only reason you may have been investigated is that within 90 days the Attorney General couldn't completely, absolutely determine that you didn't commit a crime.

Senator COHEN. So, in your judgment, there would never be a case in which a person would actually benefit from having a special prosecutor appointed in order to clear the allegation against his integrity as long as he was engaged in lawful activity.

Mr. GIULIANI. Well it's like catch-22. If you assume a situation where there is a massive leak of incorrect facts, there's a great deal of pressure that builds around the appointment of a special prosecutor and in some ways these provisions help that kind of media pressure build. And to focus ——

Senator COHEN. Let me do the reverse: Suppose you're a high-level official; you're charged with an allegation made that you committed a crime and the Attorney General decides that this is unsubstantial. Because we don't have any credible witness, and the case is not even going to be considered.

Do you think a stigma hangs over the head of that individual who was charged with having violated the law when nothing is brought up by the Attorney General?

Isn't there some merit in having a special prosecutor who has no ties to the administration, who is not part of the cabinet passing judgment upon a high-level official, saying that this man is cleared? Don't you find some benefit in that to the accused?

Mr. GIULIANI. Yes; once you get to the stage of its having risen to the level of significant public attention and a great deal of speculation about the appointment of a special prosecutor. In the long run that person is, however—and I think we have to recognize that—seriously damaged and will carry that stigma with him publicly for a very long period of time.

Senator COHEN. Don't you think this also carries a stigma in the event an allegation is made and it's just given short shrift by an Attorney General or Justice Department? Don't you carry a stigma for the rest of your life with that, too?

Mr. GIULIANI. Well anyone who would do that shouldn't be Attorney General of the United States. Anyone who would give short shrift to a serious allegation against a public official or, for example, one that received media attention, that person not only shouldn't be Attorney General of the United States, he probably is not sensible enough to be Attorney General of the United States.

You take the Richard Allen matter. The Justice Department in that matter determined that there was no need for the appointment of a special prosecutor, but that was not done secretly. A very detailed report was issued by the Attorney General to explain his decision to the public.

And I don't think that in that particular circumstance there would have been any benefit by the appointment of a special prosecutor, there just would have been additional damage done to a reputation.

Senator COHEN. Why do you think that Secretary of Labor Donovan, in a letter to the Attorney General, called for the appointment of a special prosecutor immediately to determine the truth once and for all? If you think that the press takes off on a special pros-

ecutor, don't you think he had enough confidence in the Attorney General's Office to clear his name of any conflict? Why did he?

Mr. GIULIANI. I think I really shouldn't comment on that matter which is still pending.

The reasons and the rationale for that would best be answered by his lawyer.

Senator COHEN. And he said "a special prosecutor is necessary to conduct the sort of investigation that is required when dealing with the likes of Mario Montuoro." Why would he say you need a special prosecutor to deal with a person like that?

I don't know this for sure, but could it be that he has some questions about a man who has, in fact, cooperated with the Department of Justice in past cases and now is one of the accusers against him—that he wants somebody independent to analyze those charges and to rebut those charges?

Mr. GIULIANI. I wouldn't know, Mr. Chairman, I don't know the motivation for that decision, and I really shouldn't comment on it since it is a pending matter.

Senator COHEN. I raise the issue because I think there is a case where a man, a high-level official, a Cabinet officer, says: "I want a special prosecutor, I don't want the Attorney General handling this, I don't want any charges of coverup. I have enough confidence in my own integrity and so forth that I'm going to be cleared on this. I don't want the allegation hanging over my head that somebody just took a dive on this one at the Justice Department to protect the high-level member of the administration."

It seems to me that could be a very real concern on the part of an accused official.

Mr. GIULIANI. Giving the Attorney General, however, the opportunity to demonstrate that the Department of Justice will not take a dive—and that can be demonstrated by issuing a public report, that can be demonstrated if the facts warrant it and it's fair in bringing the case. Long-term it's something that the Department of Justice really needs in order to avoid the continued repetition every time we talk about the appointment of a special prosecutor, that the Attorney General cannot be trusted, the Department of Justice cannot be trusted.

I think that is a very deteriorating kind of thing to constantly be going on every time one of these cases comes up. There's a great deal of public comment and a great deal of public discussion about the fact that the Attorney General cannot be trusted.

In fact, in our history there have been only very, very few times when that was so. And I have confidence that, given the appointment process, the process of confirmation, we're going to choose Attorneys General who can be trusted and can demonstrate that.

Senator COHEN. One more question before I yield to my colleagues.

Last year in your testimony you criticized the present law by saying it requires all preliminary investigations to be treated as highest priority, whether or not the allegation would otherwise warrant such treatment. This has diverted scarce investigative, prosecutive, and financial resources away from other, more pressing matters. The act does more harm than good because it encourages the misallocation of resources.

Do you still believe that to be the case?

Mr. GIULIANI. I believe that S. 2059 would ameliorate a great deal of that. Yes, I do believe that to be the case with regard to the present provisions.

Senator COHEN. Absent the Ethics Act, would an allegation that the Secretary of Labor was present during illegal payments to union officials be a high priority in the Department?

Mr. GIULIANI. Yes. But the present act does not cover the Secretary of Labor alone for allegations such as that.

Senator COHEN. We're trying to correct that with S. 2059.

Mr. GIULIANI. But as I said, I believe that S. 2059 would substantially alleviate the problem. I believe that the present law does create that problem.

Senator COHEN. Thank you.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

The statement on page three that S. 2059 rests on the presumption that the department of government charged with the duty to investigate and prosecute all Federal crimes cannot be trusted to investigate and prosecute certain cases or certain individuals seems to be at the heart of the matter, the heart of your opposition.

I'm wondering whether or not you would take the next step and decree that if, under your proposal, it's discretionary, the Department of Justice and the Attorney General requested the appointment of a special prosecutor, assuming he has discretion, would that request for the appointment of a special prosecutor suggest that the Attorney General can't be trusted to prosecute?

Mr. GIULIANI. No, it would suggest an Attorney General who judiciously made the determination on his own, that this was a matter where the public and the Department would best be served by an independent person passing judgment on this case. That would assist in building——

Senator LEVIN. Wouldn't that be based on the assumption that he can't be trusted to prosecute? Why else would he ask the appointment of a special prosecutor except that he can't be trusted?

Mr. GIULIANI. However it would show an Attorney General that made a judicious determination such as that.

Senator LEVIN. I understand judicious determination——

Mr. GIULIANI. And it would—if I can complete what I'm saying—it would build public confidence in the judgment and the integrity of the Attorney General and in his sensitivity to issues of appearance of conflicts of interest rather than put the Attorney General in the position of being mandated in all of these situations to appoint special prosecutors.

Senator LEVIN. My question is, however, would it not imply that he can't be trusted by his mere asking for the appointment of a special prosecutor?

Mr. GIULIANI. No, I don't believe it would. It would not show——

Senator LEVIN. Then why does the statute imply that?

Mr. GIULIANI. Because the statute mandates the appointment of a special prosecutor it takes all discretion for making these judgments away from the Attorney General and says we do not trust the Attorney General of the United States to make a significant de-

termination like that, but by operation of law in all of these situations we dismiss the Attorney General from the case.

Senator LEVIN. You're saying that if the statute requires the appointment of a special prosecutor, that implies mistrust.

Mr. GIULIANI. Of course it does.

Senator LEVIN. Wait a minute.

When the Attorney General requests the appointment of a special prosecutor, that is not to suggest that he can't be trusted.

Mr. GIULIANI. That is absolutely correct.

Senator LEVIN. I would suggest that your logic is faulty because neither one of them is based on lack of trust, both of them are based on the appearance of conflict of interest, and they exist in both cases to the same extent. That's what we're interested in, the appearance of a conflict of interest.

I would like you to give me a circumstance where there have been allegations made against the spouse of the President of the United States where the appointee of the President is investigating that spouse and allegations against that spouse and where that does not involve an appearance of conflict of interest, just give us some circumstances.

Mr. GIULIANI. Senator, first of all, we can create appearances of conflicts of interests——

Senator LEVIN. No, no, give me some circumstances.

Mr. GIULIANI. I'm responding to the first part of your statement. It's like a circle. By what we do, what we say and how we legislate, we can create appearances of conflict of interest, and we can either underline public distrust or we can build mechanisms to try to move away from that.

There might very well—as I said to Senator Cohen before when I was asked about relatives, it would be difficult to imagine a situation in which any Attorney General, regardless of his relationship to the President, would not appoint an independent counsel to investigate allegations, serious allegations, ones that had to be investigated against the President or his wife. Any Attorney General that did the opposite of that would not be acting sensibly and would be subject to severe public criticism.

And that may very well be the best kind of mandate to have for this sort of thing, because it also permits him the discretion to build public confidence in him and his department by making that judgment.

I believe when you go beyond a spouse, however, and you begin talking about children, brothers and sisters, others where the relationship may or may not be close and the relationship between the Attorney General and the President can be different, that there should be discretion.

So the answer to the question is, I agree with you that any allegation against a President's wife or husband, or whatever, would be one where certainly it would create an appearance of a conflict of interest.

My only dispute with you is the Attorney General should be permitted on his own to demonstrate that he can make the judgment to appoint an independent counsel in that case as opposed to being mandated by law to do so.

Senator LEVIN. Do you trust the Attorney General to prosecute the spouse of the President?

Mr. GIULIANI. In fact, Senator, although I have stated my views on this, if we cannot trust the Attorney General to prosecute the spouse of the President you should not confirm him as Attorney General, and we should be talking about removing the Attorney General from office if we don't trust him to do that.

Senator LEVIN. Your answer is yes.

Mr. GIULIANI. Since we trust him to prosecute thousands of people in this country.

Senator LEVIN. Your answer is yes, in short?

Mr. GIULIANI. Yes, and we should as a government.

Senator LEVIN. And the other thing, you can't imagine any circumstances in which you would allow a person whom you trust to prosecute the spouse of the President?

Mr. GIULIANI. I would permit him the discretion to make that judgment.

Senator LEVIN. I understand. You've said that three times.

My question though is you would not and cannot perceive any circumstances under which you would allow a person you trust to prosecute the spouse of the President, is that right?

Mr. GIULIANI. No, that's not right.

Senator LEVIN. What other circumstances?

Mr. GIULIANI. It's not a question of what I allow or don't allow, and I don't believe it should be a matter of what the Congress allows or doesn't allow. It should be left to the discretion of the Attorney General to make that determination. An Attorney General would be well advised in considering his own reputation and the reputation of his department to make the judgment that he and his department should not investigate the President or the President's spouse.

Senator LEVIN. Would you answer my question?

Mr. GIULIANI. And that, I think, is better public policy.

Senator LEVIN. Let me ask my question one more time. I'll try it again.

You say that you do trust the Attorney General to prosecute the spouse of the President—let me just repeat my series of questions—if not, we shouldn't have him as Attorney General.

But nonetheless you cannot state any circumstances under which you can conceive of a person who you trust to prosecute the spouse of the President should prosecute the spouse of the President, is that your——

Mr. GIULIANI. It makes more sense——

Senator LEVIN. Is that true? Am I correctly stating your position?

Forgetting the why you believe, is that a correct statement.

Mr. GIULIANI. That is not the way I would state my position.

Senator LEVIN. Is that a correct—finally, Mr. Giuliani, let's get down to a different question and for that we'll all be thankful: You say that we fail to deal with close friends or business associates of the President in this bill.

Would you propose that we amend the bill to include a special prosecutor for close friends or business associates of the President

under either of two circumstances: one, to keep it mandatory, the other was if you make it discretionary?

Mr. GIULIANI. The answer to the first is no, the answer to the second is yes.

Senator LEVIN. And I think the last question—and I'm probably out of time—is in the event that we keep a mandatory bill for families of high-level officials, would you then propose that we have a discretionary appointment of a special prosecutor for close friends and business associates?

Mr. GIULIANI. Yes, I would.

Senator LEVIN. Even though we keep the mandatory one for the others?

Mr. GIULIANI. Well, I would urge that you not keep the mandatory, but if you did then I would urge having a discretionary subsection of it that would deal with close associates.

Senator LEVIN. Thank you, sir.

Senator COHEN. Senator Rudman.

Senator RUDMAN. Thank you, Mr. Chairman.

Mr. Giuliani, I think your testimony this morning is very helpful to the subcommittee in a number of areas, and I think some of the suggestions contained in your testimony, as was your testimony last year, will certainly be helpful to us and might be convincing in some areas.

But I would like to move from the essentially legal issues that we've been talking about thus far and move on to your position concerning the constitutionality of this particular law which now exists and which we propose to amend.

If I understand you correctly, you are saying that it is your position that under the separation of powers doctrine this is, in fact, an unconstitutional statute?

Mr. GIULIANI. No.

Senator RUDMAN. Then will you tell me——

Mr. GIULIANI. Are you saying S. 2059, or the present law, sir?

Senator RUDMAN. Either.

Mr. GIULIANI. I think we have to see it as a spectrum.

Under present law, the Department has very serious concerns about the constitutionality because the appointment of the special prosecutor, the supervision of the special prosecutor and except under for extraordinary circumstances the removal of the special prosecutor are taken out of the executive branch of Government.

We believe that creates a situation where a very, very good argument could be made that Congress has created a fourth branch of Government and that a court might very well conclude that present law is unconstitutional.

With regard to S. 2059, we believe that you have substantially ameliorated many of those concerns. But one question still would remain and probably at some point would have to be litigated and that is the appointment process. And what we would urge to remove that concern would be appointment of the special prosecutor by the Attorney General with the advice and consent of the Senate if the Attorney General acted improperly or incorrectly in selecting such a special prosecutor, and that would be a perfect analogy, for example, to independent agencies where the President

makes the appointment on the advice and consent of the Senate and the person can only be removed for good cause.

Senator RUDMAN. So what you are saying is that if a member or members of the judiciary are allowed to appoint prosecutors within the Justice Department, then that gives rise to a question of constitutionality, is that correct?

Mr. GIULIANI. A question; that's correct.

Senator RUDMAN. Under present law in your Department if a vacancy occurs in the office of the U.S. attorney the district judge for the district of New Hampshire appoints, is allowed to appoint, and has been held under the Constitution to be allowed to appoint an acting U.S. attorney.

You tell me the difference between what we are doing here and that case, not factually, but constitutionally.

Mr. GIULIANI. Senator, in fact that's a very good example because that is exactly the case that would create the problem. The reason the constitutionality of that has been upheld many years ago by the Supreme Court was that that passed constitutional muster because the Attorney General, the President, can remove the person appointed by the court at will without any showing and can replace that person at will with whomever he selects. That was the rationale for upholding constitutionality of permitting a court to appoint a member.

Senator RUDMAN. But we have a removal provision in the statute.

Mr. GIULIANI. Well, you do. But you place a standard on it. And you don't use the language of at will; you place a standard of good cause on it. And if I were representing a person and wanted to challenge the constitutionality of the provision the way you do it in S. 2059, I would say that that was a very, very major part of the reason why the constitutionality of the appointment process of the U.S. attorneys was upheld, and by having placed a burden on the removal power you have in essence taken this person out of the control of the executive branch of the Government.

Senator RUDMAN. Well, let me give you another possible reason. And I will tell you that I would really enjoy the opportunity to argue that in the Supreme Court because I think it looks—I think that your reading the Constitution in such a narrow and strict way that you come up with conclusions which I just can't join in. And I refer you to section 2, and let me just recite something to you here.

Article II, section 2, dealing with the President, the first part of that deals with the President's powers. And so it's interesting where this appears. It deals with his duties as Commander in Chief and so forth and so on, and then it talks about his treaty-making power, his power of the Senate to advise and consent. And then it says:

> He shall . . . appoint Ambassadors, other public ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law . . .

And then it says this:

> . . . but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments.

And inferior officers have always been construed to mean officers that are not cited specifically within the Constitution.

Now I think, Mr. Giuliani, that on a constitutional basis that is a much stronger argument per se as to what the words of the Constitution say, read in conjunction with dicta in those cases which allowed District Courts to appoint U.S. attorneys, than your argument which I think really gets to be such a strict construction of the Constitution as to defy modern interpretation.

I would like you to respond to that.

Mr. GIULIANI. Well, I'll say I agree with that. I think, although I do not know—nor am I in the business of predicting how courts and the Supreme Court would decide this issue—in fact, if under present law, if the appointment is taken away from the President and the executive branch of the Government, its supervision is taken away from the President and the executive branch of the Government, and if removal can only occur for extraordinary circumstances, in my view, the Congress has created a creature that is outside of the three-branch system, and certainly outside of the control of the executive branch of the Government.

All of the cases that you're talking about make distinctions based upon how much of an executive function the official is performing. They talk about core executive functions. There can be nothing more essential to the executive branch function than the decision to prosecute, than the faithful execution of the laws. And I believe that a very serious constitutional argument could be made, and it would be a very good chance that any number of judges would conclude that the present law is unconstitutional.

You go a long way in S. 2059 by making removal for good cause something that can be done by the President and the Attorney General acting through the President to ameliorate a big part of that argument. And I would come out differently in terms of predicting where a court would come out on S. 2059.

Senator RUDMAN. Well, let me——

Mr. GIULIANI. You leave a good constitutional argument that can be premised on the very case that deals with the constitutionality of appointing, of courts appointing U.S. attorneys. And I think you could alleviate that constitutional question by having the special prosecutor selected by the Attorney General and subject to confirmation by the Senate, and that would leave a safety valve in case an Attorney General made an inappropriate or incorrect decision. And that would also have the benefit of following the way in which we deal with these questions with regard to independent agencies. It would be a perfect analogy to the way we act in other situations.

Senator RUDMAN. Well, one more comment or question, Mr. Chairman, in the couple of minutes I think I have remaining.

I think that this particular amendment to this statute has done one other thing which you have not really cited in your response to my question concerning the constitutionality, and that is that we have changed the standard under which the Attorney General does or does not appoint a special prosecutor. That is a very important legal point if we're not talking about what would be considered in terms of the powers of the various branches.

We now say: "finds reasonable grounds to believe that further investigation or prosecution is warranted."

It's my view, Mr. Giuliani, that by doing that, by essentially making the Attorney General a one-man grand jury with a far different standard than most grand juries, that we have brought the executive branch into this at a sufficient level to preserve the kind of constitutional separation that you're talking about. And I wonder if you might respond to that.

Mr. GIULIANI. Well, first of all, I heartily support the change. I think not only for constitutional reasons——

Senator RUDMAN. Do you think it helps the Constitution——

Mr. GIULIANI. Yes.

Senator RUDMAN. That's all I really wanted to know.

Thank you, Mr. Chairman.

Senator COHEN. Mr. Eagleton.

OPENING STATEMENT OF SENATOR EAGLETON

Senator EAGLETON. Thank you, Mr. Chairman.

At the outset, let me compliment you on the scope of these hearings, which has been excellent, and the thought that went into the bill, which I also think is excellent. And I think the questions here today have been right on the mark.

Mr. Giuliani, throughout American history different Presidents have used different criteria in selecting their Attorneys General. Woodrow Wilson picked a fellow named McReynolds. He became such an obnoxious burden to the President within the Cabinet meetings that the only easy way to get rid of him was to kick him up to the U.S. Supreme Court. And later Wilson wrote that that was the most grevious public act that he ever committed.

So sometimes the Presidents have had antagonistic Attorneys General. I think Lincoln also had one that he didn't get along with too well either.

But in more recent times it's been a 180-degree flip. The Attorney General is now a close, almost bosom, buddy of the President. President Truman picked Tom Clark, who was, according to the historians, a frequent participant, along with Speaker Rayburn and others, in get-togethers with President Truman at the White House. There's nothing unusual about that; they were just very close friends.

President Kennedy picked his own brother. LBJ picked a fellow Texan, Ramsey Clark. And, again, his father, Justice Clark, was a close friend of Johnson. Nixon picked his law partner, John Mitchell. Carter picked a long time close friend, who may have been a Carter lawyer in one or more matters, Griffin Bell. And now Ronald Reagan picks his own personal lawyer to be Attorney General.

I think all of that accentuates the need for a special prosecutor, or, as it would be called in the bill, independent counsel. The issue isn't really that we don't trust you, or that we think you're a bunch of crooks, or that we think you will violate your oath of office. The issue is really the one that Senator Levin and Senator Cohen raised, the appearance of propriety, the appearance of independence.

Also, by way of analogy, I recall that when Judge Haynesworth was being considered for the Supreme Court and ultimately was re-

jected, perhaps the single most compelling argument against Judge Haynesworth was a canon of judicial ethics dealing with the appearance—and that's the word in the canon—the appearance of impropriety.

So it's the public appearance; what appears to be free and fair and independent versus what appears to be a tight little group. And that's why Senator Levin and Senator Cohen were asking you whether any Attorney General, especially one that is so close to the President, his own lawyer or his own brother, can investigate the wife of the President or the brother of the President or the son of the President or some other closely connected figure within the administration. And I think that's what this legislation is all about.

And under present circumstances, with all these recent Presidents appointing very closely connected individuals to be the Attorney General of the United States, there's no way in my opinion we can satisfactorily prove to the public that a thorough, independent, totally independent investigation is being made in these cases.

And that doesn't demean the skills of the Justice Department or the people who work there. It is just inherent in the process where you have the Attorney General of the United States trying to investigate some figure closely connected to the administration.

I would also like to make this point: If we go back to the old way—if the law expires and we don't have a new one—I think some innocent people could be harmed. I call it the bend-over-backward syndrome. Let's say we go back to the old way and a case develops with respect to a certain individual closely connected with the administration. The Attorney General may think, "We'd better nail that SOB because my reputation is on the line, everybody knows I'm close to the President and everybody knows this person I'm investigating is very close either by blood or connection or marriage or something; so I'd better nail this person because that's the only way I'll be able to satisfy the public that I've really been a vigorous, independent Attorney General."

So I think the old way just is fraught with enormous problems—public relations and credibility problems on the one hand and fundamental fairness problems in terms of this bend-over-backward business.

So let me ask you, as did Senator Cohen and Senator Levin, a hypothetical: Let's go back in time to the Kennedy era. Suppose an allegation had been made that Sargent Shriver, who was head of the Peace Corps, had personally profiteered by some grant or award that the Peace Corps had made. And you've got the President of the United States, John F. Kennedy, Attorney General of the United States, Robert Kennedy, and the allegation were made with respect to their brother-in-law.

Now how could Attorney General Robert Kennedy carry the burden of persuading the public as to the independence and thoroughness of the investigation under that hypothetical circumstance?

Mr. GIULIANI. I assume, using a hypothetical, what Attorney General Kennedy would have done was essentially what he did when the Kennedy family lawyer, tax lawyer, Judge Landis, was under investigation in the southern district of New York. He recused himself from the case. He appointed his deputy, now Justice

White, to be the Attorney General for that case. And the U.S. attorney in the southern district of New York made the decision to prosecute it and Attorney General Kennedy remained out of the case. He recused himself from it.

I think that would be——

Senator EAGLETON. I'll take that as a factual recitation. I vaguely recall the Landis matter. I'll take it your recitation of facts is correct.

Was his recusal sufficient enough? For example, in the Lance matter, Griffin Bell, a close friend of Mr. Lance's from Georgia, recused himself in favor of the Deputy Attorney General, Mr. Civiletti. Is that good enough, really? Does that play in Peoria insofar as independence and credibility is concerned? In the court of American public opinion, are the people going to be satisfied that Griffin Bell steps aside and Civiletti takes over, or earlier when Robert Kennedy stepped aside in favor of Judge White? Is the public going to say, yes, that deputy, he's really going to dig into this since this other fellow has stepped aside in his favor. Is that good enough?

Mr. GIULIANI. I think in a particular case it may or may not be. Over the long haul it is probably the wiser way to do it because the Department of Justice, the Kennedy Department of Justice and the Bell Department of Justice gets to make a number of decisions like this. There is no one case that is going to be the one case on which you decide whether you can or cannot prosecute.

Having made the decision, having demonstrated that the Kennedy Department of Justice could in fact prosecute the family lawyer in an appropriate way, it was probably very helpful to building public confidence in that Department of Justice. And to show that an Attorney General can exercise the discretion and judgment to recuse himself also helps that.

When you take that away from the Attorney General—and the broader the mandatory areas the worse it becomes because then there are many more of these decisions being made—you institutionalize, I believe, public distrust in the Attorney General, both the Attorney General as an institution and the Department of Justice as an institution. And we don't permit him the scope within which he can demonstrate that he and his Department of Justice can be impartial and make judgments like "I should recuse myself" or "Yes, we should go with this case" or "No, we shouldn't."

And over a 1-, 2-, or 3-, or 4-year period, however long someone is an Attorney General, you get the opportunity to build your record.

Senator EAGLETON. Would you comment as an observer of the recent scene, as far as Justice Department affairs are concerned—you weren't with the Department in 1977 or 1980, were you?

Mr. GIULIANI. I was with the Department of Justice for a very brief period in early 1977. From 1970 to 1975 I was——

Senator EAGLETON. In any case, in terms of the matter before us here today, comment for me on how efficaciously the Justice Department handled the Bert Lance matter.

Mr. GIULIANI [continuing]. I was not with the Justice Department during this period.

Senator EAGLETON. The statute wasn't in effect at the time of the Lance matter. But thinking back on the evolution of the Lance

matter, Griffin Bell stepping aside, Civiletti taking over from that point in time, in terms of public confidence, public credibility, public trust, how do you evaluate the handling of the Lance matter?

Mr. GIULIANI. I really don't know, Senator, if I could give any helpful comment on that. I was not involved in it. I followed it from the newspapers. I followed it more closely than the Billy Carter peanut probe, and I thought that was handled very appropriately by the Department and very well by appointing an independent counsel who was in a permissive area, not in the mandatory area.

There was some criticism in the beginning about the appointment, I recall. And there was great public acceptance of the report in the end as having resolved the issues. I thought that whole episode built confidence in the Department.

I really honestly don't recall the way in which the Lance matter was handled.

Senator EAGLETON. Well, I remember reading a column—I can't recall whether it was Wicker or Broder or who—when Bell stepped aside and Civiletti took over, the columnist opined—one man's opinion, a syndicated columnist—that the only way the public would be satisfied as to the thoroughness and as to the vigor of the investigation would be if Mr. Lance were indicted. Now that's just one columnist. With freedom of speech and press, he's free to say what he wants. But he was opining that under the circumstances, the closeness of Mr. Lance to the administration both in the job that he held, OMB, and the personal friendship with the President and the stepping aside of the Attorney General, that the only way the public could be satisfied that—quote—"Justice had been done" was if Bert Lance were indicted.

That's what I mean by the bend-over-backwards syndrome. And history will have to judge as to the fairness of the Lance hearings, the fairness of the Lance indictment. It was later a hung jury, as I recall. And I just wonder if justice, in its noblest sense, was truly served by the handling of that case. And that was under the old law. There was no statute with respect to a special prosecutor.

I wonder. I think history may say on balance that Mr. Lance at all times was not fairly treated, that he started with two and a half strikes against him the day Civiletti took over, with all due respect to Mr. Civiletti.

Well, I just wanted to emphasize what I think Mr. Levin and Mr. Cohen were saying. We're not casting aspersions on this Justice Department or any future Justice Departments. We're trying to achieve a system by which the public can have ongoing and continuing confidence that in these highly sensitive kinds of cases that a free, unfettered and fair investigation is being made independent of any political or family connections that might be involved.

Thank you.

Mr. GIULIANI. Thank you, Senator.

Senator COHEN. Thank you very much.

Senator LEVIN. Could I ask one question?

Senator COHEN. Sure.

Senator LEVIN. I just have one follow-up question.

We have court laws which require judges to recuse themselves in cases involving close relatives and in other circumstances. It's not discretionary, as I remember, it's a mandatory rule.

Is the adoption of that court rule by this Congress and by the court or both, whoever adopted it, to suggest that we don't trust judges? Does that undermine the system of justice, that court rule? Would you recommend that that court rule be repealed?

Mr. GIULIANI. You don't have a rule such as that. The rule is that you have set forth a standard that a judge applies himself and makes the determination that he is—for example, the appearance of a conflict of interest. You don't define what an appearance of a conflict of interest is. He has to make that determination.

Senator LEVIN. I'm talking about the degree of—do you say that a Federal judge can sit on a case involving his brother or his father?

Mr. GIULIANI. I don't know—maybe I'm wrong—I don't know of any statute that prevents a Federal judge from sitting——

Senator LEVIN. If there were a court rule—which there is—that prohibits a sitting judge from listening to such a case, would you suggest we repeal that rule because it undermines the system of justice?

Mr. GIULIANI. I think the judge should make the determination himself as to whether there is a conflict of interest. And that can be appealed by litigants to the court of appeals. Issues like that have been appealed. And I think we would be better served by a rule that left it to the discretion and conscience of the judge and could be tested by people.

Senator LEVIN. Thank you.

Senator COHEN. Just a couple of other points. I think Senator Eagleton did in fact phrase the issue aside from the constitutionality. Beyond constitutionality is public policy. I think that Elliot Richardson will perhaps support your own position when he testifies about the fear that such legislative policy will somehow institutionalize mistrust of the Justice Department. I won't debate that any further with you.

The question I guess we have to resolve as public policymakers, is which does the greater harm to our society: Is it to create the mechanism for a limited number of cases under limited circumstances where you have an independent impartial unbiased unpoliticized investigation of high officials which are charged with violating Federal law? Is that a greater harm to our society, our social structure, than a lingering sense of mistrust of a judicial system and a cloud which hangs over that Justice Department saying that they investigated here and they cleared him, they didn't follow through; the old sense of double standard?

Which is of greater harm: Creating a mechanism for a limited number of cases for limited circumstances beyond the Justice Department's normal activities or balancing that against the kind of poisoned atmosphere which can hang over the entire Justice Department? Those are the kinds of competing values that we have to weigh and say which is of less harm and which better benefits society.

One question about the specifics:

When does the 90 days start ticking—Assuming this survives through Congress and the Supreme Court, when does the 90-day period start to count?

Mr. GIULIANI. That's been a very difficult question for the criminal division of the Department. In the times in which we've had to apply the statute we've had some difficulty in determining that.

The 90-day period under present law begins to run when the Department receives specific information that a covered official may have violated the law. That is such an ambiguous standard that you could have a very healthy debate over when you receive specific information and when you don't.

For example, in the Richard Allen matter that is now a matter of public record and over with, so I feel comfortable discussing it, how it was originally discovered was cash, $1,000 in a safe with a note that appeared to be a note to the First Lady. And it was found in Mr. Allen's safe. Does that or does that not constitute specific information that a covered official violated the law.

The way we analyzed that, no, it did not constitute specific information; it constituted suspicion that a crime may have been committed, but certainly not specific information that a covered official violated the law. So that at all times when we were operating under that statute—and this was the determination of the criminal division section—their advice to us was that we were not operating under the special prosecutor provisions because at no time did we receive specific information——

Senator COHEN. When does it ripen?

Mr. GIULIANI. Well, the easier case is the—and the one I think the statute was drafted around—is the case of an allegation, someone coming in with an allegation that the Secretary of whatever has taken a bribe. And it may be an incredible allegation, it may be a frivolous allegation, but at least it would constitute specific information that a crime was committed.

The act envisioned the normal way in which most cases begin; with an allegation. It didn't envision an investigation beginning with some circumstantial facts that might raise suspicion but not constitute specific information that a crime was committed.

Senator COHEN. Let's take the Donovan case, for example, without getting into any of the judgments on it. As I understand it, the criminal division received an allegation on Mr. Donovan on September 21, 1981, and the Attorney General was first informed of the allegation on December 2, 1981.

Mr. GIULIANI. That is correct.

Senator COHEN. Press reports indicate that the Department did not begin its preliminary investigation until December 2.

Mr. GIULIANI. That is correct. And that is a problem that faced the Justice Department before also. The Justice Department is very, very——

Senator COHEN. I want to come back to your point. You had a specific allegation back on September 21. Now does the time start to tick from the receipt of a specific allegation or does it begin when the Attorney General first becomes aware of the allegation?

Mr. GIULIANI. The interpretation of the Office of Legal Counsel would fall somewhere in the middle of that, that specific informa-

tion given to any member of the Justice Department—since there are 52,000 employees—would not constitute notice under the act.

For example, if someone walked in to a secretary and said, "I have information that the secretary of something-or-other received a bribe," that would not be sufficient. However if that information reaches someone who would have policy responsibility within the Justice Department—and the Department has put in place mechanisms, as it has, for receiving that information—it would be on the date that that information was received by the criminal division, the FBI headquarters, and that is the date that's used internally for determining when the beginning of the 90-day period starts.

And you could interpret that. You could say that Congress literally meant the Attorney General when it said Attorney General, or it does not. And an argument like this was made internally, at least. Congress does not delegate the decision further down than the Attorney General; therefore they have not delegated receipt of information any further down or vice versa.

You could say that receipt by any member of the Justice Department constitutes receipt by the Attorney General. The Office of Legal Counsel I believe has arrived at a practical commonsense interpretation of it. A 52,000 person agency with our legislative history doesn't really help in determining what was meant by receipt by the Attorney General.

Senator COHEN. Senator Rudman.

Senator RUDMAN. I just wanted to come back to Senator Levin's earlier questions. There is, of course, a rule that applies to the Federal judiciary. And without citing that rule specifically, it is your opinion, if I understand correctly—because I really want to understand philosophically what the Justice Department is saying here—that that rule isn't necessary, that you can leave it to the judiciary in all cases to decide whether or not the recuser should be an order. That is your position.

Mr. GIULIANI. My position is that you should pass rules that put judges on notice as to what would and would not constitute situations of conflict, and that we should leave to their judgment and discretion the exercise of that judgment. And I don't know if the law is any different than that.

Senator RUDMAN. I think it is. I think the law is quite different from that as to the Federal judiciary in my State, for the Federal judiciary.

But let me just simply—and we don't have to get into the cites, but they're available.

Let me say to you that essentially what you're saying here indicates to me—and I respect your position. And I'm sure that my friend Elliot Richardson is going to testify, and I've seen his testimony on some of these similar points. But you have to understand that we're looking at three things here:

First we're looking at the pure legal factual issues. Second, we're looking at some constitutional issues which are of great interest to lawyers and Constitution scholars. But very importantly, we are looking at issues of public policy and public confidence. That's really what we are looking at.

What we are really groping with here is do the American people have confidence in their Government. And history proves that

when that confidence level declines, in this country or others, that's when the whole system of justice starts breaking down. And I thought Senator Eagleton's discussion was very interesting in going through a history of the former Attorneys General.

The fact of the matter is that the American people largely feel, if you look at public opinion polls, that amongst high officials in Government, in the Congress and in the executive branch as well, there is a very cozy relationship, and we get treated somewhat differently from anybody else, which in fact in most cases is not true. But you certainly aren't going to convince anybody of that if you allow the law to be as you would like it because the American people won't buy it. And the reason they won't buy it is they've had too much proof that it just isn't so. And that's why we're here this morning.

Senator LEVIN. Mr. Chairman, forgive me.

Senator COHEN. I'd like to continue the debate, but we have three more witnesses. Mr. Richardson has to leave by 11:30.

Senator LEVIN. This won't be a debate. Let me just cite to you the Federal court—as I did last year too—let me cite to you again 28 USCA, section 455 says: "Any justice, judge or magistrate of the United States shall disqualify himself * * * in the following circumstances* * *"

And it lists them. And there are a whole lot of circumstances. It doesn't say "may," it doesn't say "at the discretion," it says "shall." And then it says, for instance, No. 5—and I don't want to go through 1 through 4, but No. 5: "* * * he or his spouse, a person with some degree of relationship to he or his spouse if such a person is the party who receives * * *"

And so forth. It is a mandatory court ruling, as I cited last year, for the same purpose as I raise it this year. Frankly, I'm surprised when you say it's discretionary for the Federal judges. It is mandatory, and for good reason, because government needs credibility to govern well.

I simply wanted to give you again, as I did last year, a mandatory court ruling.

Mr. GIULIANI. May I just say that I agree that we should be—and I think we both have the same goal—building public confidence in the institution of government. The more limited the circumstances under which a special prosecutor must be appointed, the further I think we come together on the way in which we arrive at that goal.

And I applaud the subcommittee's efforts on S. 2059. I think it is a substantial improvement both from their own point of view and even from the way in which we view it. We think it would be a very major improvement over the present situation. And if you could limit it even further than that, we would consider that even more of an improvement, and cutting down the number of situations in which this issue is raised to those in which there is just absolute necessity for doing it.

Thank you very much, Mr. Chairman.

Senator COHEN. Thank you very much for your testimony.

[The prepared statement of Mr. Giuliani follows:]

PREPARED STATEMENT OF RUDOLPH W. GIULIANI

Mr. Chairman:

I am pleased to be here today to present the views of the Department of Justice concerning S. 2059, a bill to amend the special prosecutor provisions of the Ethics in Government Act of 1978, 28 U.S.C. § 591 et seq.

Last spring, this subcommittee held two days of hearings designed "to assess the merits and the shortcomings of the [special prosecutor] law." Hearings before the Subcommittee on Oversight of Government Management at 1 (1981). As a result of those spirited and productive hearings, this very able subcommittee and its hard-working staff developed S. 2059. The Attorney General and the entire Department of Justice join me in complimenting the subcommittee and its staff on its diligent and sustained efforts addressing the problems presented by the special prosecutor provisions.

Nevertheless, Mr. Chairman, our further experience over the past year has confirmed the Department's views concerning the constitutionality of, and the ultimate rationale for, the special prosecutor provisions. Therefore, while acknowledging the hard work and the laudable efforts of this subcommittee, the Department of Justice opposes S. 2059, as it would oppose any bill which would require the appointment of a special prosecutor in particular cases. We oppose this bill because it is unnecessary, because it may be unconstitutional and because, in the long run, it disserves the public interest.

At the same time, we recognize that there may be cases in which investigation or prosecution by the Department of Justice raises the appearance of a conflict of interest. In such cases, the appointment of a special prosecutor may be appropriate. Therefore, we further recommend that Congress amend the special prosecutor provisions to permit the Attorney General to appoint a special prosecutor whenever he determines that Department of Justice investigation would create a significant appearance of a conflict of interest. Such an approach provides the flexibility necessary to deal with varying factual situations and personal and political relationships as they arise. Further, it returns the prosecutive function to the Executive Branch and to the Department of Justice and affords the Department the opportunity to demonstrate its ability to handle sensitive cases in an appropriate way. If Congress decides to retain a statutory special prosecutor mechanism in some form, it should adopt the flexible approach we suggest, together with our further suggestions more specifically set forth below.

A. The Reasons Why the Department of Justice Opposes S. 2059

By virtue of the constitutional authority delegated by the President, the Attorney General is charged with the responsibility to investigate and prosecute violations of the federal criminal laws. Fundamental principles of separation of powers require that the authority and the discretion to handle all federal

criminal cases reside in the Attorney General and in the Department of Justice. Our three-Branch system already embodies sufficient checks and balances against abuses in that process.

Beyond our constitutional concerns, we have serious concerns about the wisdom and the policies underlying the special prosecutor provisions. Existing law and S. 2059 both rest upon the presumption that the department of government charged with the duty to investigate and prosecute all federal crimes cannot be trusted to investigate and prosecute certain cases and certain individuals. To the extent that we as a government require the appointment of a special prosecutor in particular cases, or for the investigation of particular individuals, we erode public confidence in our system's regular processes and we forego opportunities to rebuild the confidence of a skeptical public.

The Attorney General and his subordinates in the Department of Justice investigate and prosecute crimes against the United States ranging from petty offenses to murder and treason. Public confidence in the entire criminal justice system stands or falls with the Department's ability to conduct its activities, in fact and in appearance, with integrity and professionalism.

The special prosecutor provisions and S. 2059 remove certain sensitive cases from the existing system and erect an elaborate alternate system for investigating and prosecuting those cases. In so doing, the special prosecutor provisions necessarily undermine public confidence in the ability of the Attorney General and Department personnel to carry out their primary responsibilities

in all cases. This is the fundamental flaw in any legislation which requires the appointment of a special prosecutor in certain cases. Such legislation institutionalizes distrust of the system by creating an irrebuttable presumption that existing processes are incapable of performing properly in sensitive cases.

In the long run, such legislation cannot achieve its goal of bolstering public confidence in the ability of prosecutorial officials. Special prosecutors may provide an answer in a particular case. They may enhance the credibility of a particular prosecutive decision viewed in isolation. But that credibility comes only at the expense of the long term public skepticism which we nurture through an ironclad rule disqualifying those individuals who make every other federal prosecutive decision in this nation.

History demonstrates a need for special prosecutors. From time to time, special prosecutors have been essential in handling cases beyond the capacities of the state or federal criminal justice systems. But the existing special prosecutor provisions go well beyond the historic need for a tool be used in extraordinary cases. At present, there is simply no basis for a conclusive presumption that the Department of Justice is incapable of investigating and prosecuting particularly sensitive criminal cases. The occasional legitimate need for a special prosecutor can be met through means far less drastic than those established by existing legislation or by S. 2059.

The existing legislation was borne of an Executive Branch crisis of unparelled proportions. The appointment of a special prosecutor resolved that crisis, providing a short-term solution to an immediate problem. Indeed, that special prosecutor was appointed in the absence of legislation such as the Ethics in Government Act or S. 2059. But special prosecutors were never designed to provide sweeping, long-term solutions to problems in any criminal justice system.

We recommend legislation creating a discretionary, not a mandatory, mechanism for appointing a special prosecutor. Such legislation would satisfy the needs of the system without erecting a constant barrier to rebuilding public confidence in the Department of Justice. Like many legislative schemes enacted over the years, the special prosecutor provisions and S. 2059 respond to a valid and important problem. But that response is so broad, so general and so mandatory that the legislation goes well beyond the problem it sought to address and creates numerous additional problems. A narrowly drawn statute providing for the appointment of a special prosecutor in the discretion of the Attorney General would provide a complete answer to the real problem without creating the additional problems attendant to an elaborate, mandatory process.

Mr. Chairman, Americans are expected to accept decisions of the Department of Justice with respect to crime committed by society's lowliest members. We cannot long expect them to do so if the Department is not trusted to make similar decisions

for society's loftiest members. Because the special prosecutor provisions institutionalize distrust of those officials who normally and regularly conduct criminal investigations and prosecutions, the special prosecutor provisions, in the long-run, damage the public interest and are bad public policy.

B. The Constitutionality of the Legislation

In testimony before this subcommittee last year, we set forth the Department's position on the difficult constitutional questions raised by the special prosecutor provisions. I will not repeat that testimony today, except to note once again that the Department finds constitutional difficulties with the procedure by which a special prosecutor is appointed and with the standards by which the Attorney General may remove him from office.

The current special prosecutor law permits the judicial appointment of an officer who performs purely executive functions and who may not be removed by the Attorney General or the President except for "extraordinary impropriety." 28 U.S.C. § 596(a)(1). In effect, the special prosecutor provisions remove the responsibility for enforcement of the federal criminal laws from the Executive Branch and lodge it in an officer who is neither appointed by, accountable to, nor, save in extraordinary circumstances, removable by the Attorney General or the President. This officer, moreover, may set his own prosecutive standards, investigate, try and appeal any case and take

any legal position in the name of the United States without the consent of the President, the Attorney General or the Solicitor General. In form, the special prosecutor is an officer of the Department of Justice. In reality, he exercises executive functions in a manner wholly independent of the Department of Justice or the Executive Branch.

Such a role is difficult to square with the fundamental design of the Constitition. In effect, Congress has created a fourth Branch of government without amending the Constitution. The Supreme Court has never upheld an act of Congress which prevented the President from discharging officers who perform purely executive functions.

In our view, S. 2059 ameliorates some, but not all, of the constitutional doubt surrounding the appointment and the removal provisions of the special prosecutor law. Section 6(d) of the proposed legislation would make the special prosecutor removable by the Attorney General for "good cause." This is a welcome amendment which we support. Such a removal standard would make the special prosecutor no more "independent" than officers of the many so-called independent agencies in the Executive Branch and would, in all likelihood, insulate the legislation from constitutional attack in this respect.

Furthermore, this amendment, together with section 6(b) of S. 2059, would eliminate some of the potential for unfairness in the present system. In our view, a serious departure from Department of Justice policies would constitute "good cause"

for a special prosecutor's removal. Therefore, S. 2059 would help assure that the subjects of a special prosecutor's investigation will receive the same treatment as the subjects of other investigations. The bill would also afford the Attorney General a measure of supervisory control which at present he lacks.

The proposed legislation, however, would work no change in the procedure by which a special prosecutor is appointed. This leaves the legislation open to constitutional attack on the ground that it violates principles of separation of powers.

Therefore, we recommend that the Committee amend S. 2059 and current law to provide for Attorney General appointment of the special prosecutor. Coupled with removal for good cause as we understand that term, this should eliminate virtually all constitutional doubt about the legislation. Further, as noted above, it would return the prosecutive function to the Executive Branch and to the Department of Justice, thereby affording the Department the opportunity to demonstrate its ability to handle these sensitive cases in an appropriate way through a special prosecutor.

C. Changes Which S. 2059 Would Work

S. 2059 embodies a number of amendments which would more precisely achieve Congress' original intent and which would make the procedures under the special prosecutor provisions more equitable. Therefore, if Congress decides to retain a statutory special prosecutor mechanism, and subject to our suggestion

that such legislation be enacted in the more flexible form we have outlined above, we recommend that Congress enact S. 2059, subject to our further suggestions more specifically set forth below.

1. Title of Special Prosecutor

Section 2 of S. 2059 would change the title of the special prosecutor to "independent counsel." A number of witnesses at this subcommittee's 1981 hearings endorsed such a change. The Department agrees that such a change is appropriate.

2. The Coverage of the Legislation

Current law is at once overinclusive and underinclusive with respect to the persons who are "covered" by the special prosecutor provisions. As the Department outlined last year, the provisions now cover vast numbers of government employees, including middle-level personnel in the White House and elsewhere, as to whom not even the appearance of a conflict of interest would be raised by Department of Justice investigation. At the same time, the present law does not cover relatives, close personal friends or business associates of the President, as to whom the appearance of a conflict might occasionally arise in the event of Department investigation.

To remedy this situation, the Department recommended last year, and we recommend once again, the flexible approach outlined above, under which the Attorney General may appoint a special

prosecutor whenever he determines that Department of Justice investigation would create a significant appearance of a conflict of interest.

Section 3 of S. 2059, however, would work several improvements in the present law. Section 3(a) would narrow the coverage of officials in the Executive Office of the President from Level IV of the Executive Schedule to Level II. In effect, it would narrow the coverage of middle-level White House executives by about two-thirds. The Department believes that this provision appropriately narrows the coverage of the legislation.

Section 3(b), dealing with covered officials in a President's campaign committee, also works a positive change, but should be modified in one respect. Current law covers "any officer" of the principal campaign committee seeking the election or reelection of the President. 28 U.S.C. § 591(b)(6). Section 3(b) of S. 2059 would cover only the chairman, the treasurer and "any officer . . . exercising authority at the national level . . . ." Although this last term may create problems of definition, section 3(b) would improve the legislation. We suggest, however, that section 3(b) be modified so that these officials are covered only while serving as campaign officers. Once they cease such duties, we perceive no reason to remove an investigation from the normal procedures in the Department of Justice.

We find sections 3(c) troublesome and we oppose its enactment. Section 3(c) would extend the legislation's coverage to

the "President's spouse, the President's children and their spouses, and the President's parents, brothers and sisters and their spouses during the incumbency of the President." The intent, of course, is to include within the legislation's coverage those persons as to whom an appearance of conflict might arise by virtue of the Department of Justice investigation. While this intent is laudable, the proposed legislation is, in our view, much too broad and inflexible.

There is no reason to believe that an investigation of one of these relatives of the President will always give rise to the appearance of conflict. These relatives would unnecessarily be subjected to the burdens and the stigma of "special" investigation and prosecution. We believe this proposal is far too inflexible and will not materially aid in achieving the intent behind the special prosecutor provisions. This problem, as well as S. 2059's failure to attempt to deal with close friends or business associates of the President, presents yet another reason for adopting the flexible approach we have recommended, under which the Attorney General would appoint a special prosecutor for any of these individuals if appropriate in the particular case.

3. The Duration of Coverage

Section 3(d) addresses a concern we voiced last year about the duration of the legislation's coverage. Under present law, an individual remains covered for the entire incumbency of the

President under which he serves, plus the full term or terms of the next President, if the same political party retains the Presidency. S. 2059 would cover the listed officials for the incumbency of the President under which they serve plus one year, regardless of which party holds the Presidency.

The proposed change would decrease the covered time period but does not eliminate the problems engendered by existing law. The proposed change could still leave a person covered for almost nine years after he leaves office. We perceive little reason for such lengthy coverage. Moreover, an official need not be covered if the opposing party is in office. We recommend that current law be amended to retain coverage for one year after a person leaves office, but only during the incumbency of the President who appointed him.

Our recommendation would also solve the problem presented by Department officials who "hold over" in a new Administration for a few days or weeks so as to assure a smooth transition for incoming officials. By covering an official beyond the term of the President he "serves," S. 2059 would cover these hold-overs well beyond the term of the President they actually served. This makes little sense and will only discourage officials from assisting an incoming Administration during a transition period. Moreover, there is absolutely no reason to suspect that an appearance problem would arise should a current Department of Justice find it necessary to investigate allegations of wrongdoing by such a hold-over.

4. Triggering of Preliminary Investigation

Under present law, the Attorney General must conduct a preliminary investigation upon the receipt of "specific information" of the commission of a federal criminal offense by a covered person. Last year, the Department criticized the "specific information" standard because it is vague and too easily met. S. 2059 generally meets our objections. Instead of "specific information," the proposed trigger would be "information sufficient to constitute grounds to investigate." This change would permit the Attorney General to consider the credibility of the allegations and of the person making the allegations, as well as the degree of specificity of the information. This should result in greater fairness to covered individuals, while avoiding the use of scarce Departmental resources to investigate patently frivolous accusations.

Present law contains no limitations on the investigative authority of the Attorney General during the preliminary investigation. However, as we noted last year, the legislative history appears to preclude grants of immunity, plea bargaining and possibly grand jury proceedings during a preliminary investigation. Section 4(b) of S. 2059 incorporates this intent and would remove the existing ambiguity regarding the scope of a preliminary investigation.

5. Time for Preliminary Investigation

Present law allows 90 days for a preliminary investigation and makes no provision for an extension of time. Last year we

recommended that Congress lift this time limitation. S. 2059 would permit a 60-day extension upon a showing of good cause by the Attorney General. Although the Department believes that a less rigid time period is desirable, the proposed change would improve existing law.

6. Appointment of a Special Prosecutor

The present statute requires the appointment of a special prosecutor if, after the preliminary investigation, the Attorney General cannot find that "the matter is so unsubstantiated that no further investigation or prosecution is warranted." 28 U.S.C. § 592(b)(1). As we noted last year, this vague standard is considerably lower than the normal Department prosecutorial standard and could subject covered individuals to investigation in circumstances under which similarly situated non-covered individuals would not be investigated.

Under S. 2059 appointment is required only where the Attorney General finds "reasonable grounds to believe that further investigation or prosecution is warranted." In making this determination, the Attorney General may refer to written policies of the Department of Justice. These proposed changes should rectify the problems in the existing law.

S. 2059, however, requires the Attorney General to comply with "written policies" of the Department when deciding whether further investigation or prosecution is warranted. Many of the Department's prosecutive policies are not set forth in writing,

nor should they be. For example, there is no formal written policy precluding the prosecution of extremely minor thefts of government property, such as the theft of a pen or an envelope, or the prosecution of the possession of a small quantity of marihuana. Nor would it be appropriate to set forth such policies in writing, unless we are to sanction the commission of petty crimes and restrict the necessarily flexible exercise of prosecutorial discretion. Nonetheless, unwritten policies do exist, subject to exceptions for aggravated circumstances.

We do not believe that S. 2059 would preclude reference to established, unwritten policies. However, if the amended statute were so construed, covered individuals would still be treated differently than other citizens. Therefore, the language of S. 2059 should be amended by changing the term "written policies" to "existing policies" or "established policies."

7. Powers and Duties of the Special Prosecutor

Section 6 of S. 2059 would clarify two important issues and would make one improvement change in existing law. Section 6(a) would explicitly permit the special prosecutor to consult with the United States Attorney for the district in which the violation is alleged to have occured. Section 6(b) would direct the special prosecutor to comply with the written policies of the Department "except where not possible." Section 6(c) makes clear that the special prosecutor has full authority to dismiss matters within his jurisdiction without conducting an investigation, or at any

subsequent time prior to prosecution, if to do so would be consistent with the written policies of the Department of Justice.

These changes are welcome, although we again suggest that the relevant statutory language not be limited to written policies. These changes will help assure that covered officials are treated no differently from other citizens. As we noted last year, the special prosecutor provisions can have the unintended effect of subjecting high-ranking government officials to investigation and prosecution in circumstances in which other citizens would not be investigated or prosecuted. This subverts the principles of fairness and uniformity so important to our entire system of criminal justice. By explicitly conferring upon the special prosecutor the same discretion and obligations imposed on all other federal prosecutors, section 6 should provide the foundation for that fairness and uniformity which are critical to the credibility and public acceptance of investigative and prosecutive decisions.

8. Reimbursement of Attorney's Fees

The subjects of special prosecutor investigations have incurred substantial financial burdens. The present statute makes no provision for reimbursement of attorney's fees. Under S. 2059, the court may, in certain cases, "award reimbursement for the attorney's fees incurred by [a] subject . . ." of a special prosecutor investigation. In our view, the reimbursement provision

is neither necessary nor appropriate, if the special prosecutor provisions are amended in other respects to eliminate the unfairness which can prevail under current law.

S. 2059 is designed to assure that covered officials will not be subjected to an application of the criminal laws any more rigorous than that which would apply to other citizens. Therefore, if Congress enacts S. 2059 subject to the changes we recommend, there is no justification for reimbursement of a subject's fees. No other criminal suspect or defendant is allowed attorney's fees under United States law. It is unfair in both appearance and in fact to provide attorney's fees for a select group of high-ranking political officials. If the amended statute is properly applied, the precondition for granting of fees -- that the legal expense "would not have been incurred but for the requirements of this chapter" -- will never be present. In light of the other proposed changes to existing law, this provision is both unnecessary and and inappropriate.

* * * *

Mr. Chairman, I trust the foregoing is helpful to the subcommittee. I stand prepared to answer any questions you may have.

Senator COHEN. I'm very pleased to introduce our next witness, Mr. Elliot Richardson, a distinguished public servant and a good friend. Mr. Richardson's service to this country, I think, is unrivaled. He has held more Cabinet posts and has had more executive branch experience than any other official that comes to mind.

As my colleague, Senator Eagleton, was speaking of all the former Attorneys General who were close friends of the President in this morning's discussion, I thought of one exception: that Elliot Richardson was not President Nixon's first choice for Attorney General, but he was his best choice.

One condition of your testimony here today is that you submit the notes you were taking, which probably took the form of great, complicated geometric design, to the chairman of the subcommittee before you leave. [Laughter.]

TESTIMONY OF ELLIOT L. RICHARDSON, FORMER U.S. ATTORNEY GENERAL

Mr. RICHARDSON. Thank you very much, Mr. Chairman, and members of the subcommittee.

First may I say, Mr. Chairman, that I am grateful for those kind introductory words. I appreciate the opportunity to be here. And may I ask that my statement be included in full in the record.

Senator COHEN. It will be inserted in full.

Mr. RICHARDSON. To save time, I will simply summarize the essence of my testimony.

First I make the point that in my view the wisdom of any legislation requiring the appointment of special prosecutors is dubious. I would agree with the comments of members of the committee just now, including yourself, Mr. Chairman, to the effect that the central issue is one of public trust. But I do not conclude from this that one necessarily contributes to the development of public trust by the enactment of legislation predicated on the assumption that there can be no grounds for trust.

I think this legislation might better have been called in the first instance the No Ethics in Government Act because it presumes that there are none and therefore that people in public office should at every point be held down by rules predicated on the assumption that they will not do the things that they should be expected to do. It assumes that they will not recuse themselves in the situations in which this would be appropriate. Granted that as to judges there is a statutory requirement, part of the United States Code, which says in certain situations that they must do so, I would doubt very much that anyone who ought to be a judge in a Federal court would in fact fail to disqualify himself in such a situation.

There have been examples cited here this morning of cases in which Attorneys General have recused themselves. And while, as Senator Levin has pointed out, one could establish a rule on this point, it would be a rule addressed to the recusal of the Attorney General and other individual officials. The rule applicable to courts when a given judge is affected by a personal relationship or interest doesn't require the recusal of the whole court. Why require the recusal of the whole department rather than of the official involved?

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In any case, these are merely general observations drawn from a personal point of view.

I respect the responsibility of this committee and the Senate—the Congress as a whole—to determine the basic reconciliation among the competing considerations involved. This is your responsibility, and I can only say, as did Mr. Giuliani, that I think, given the point of departure from which I start, the legislation provided in your proposed amendments is moving in the right direction. Most of my testimony, most of my prepared statement, is simply addressed to the reasons why I think the amendments you're proposing are desirable amendments. In two respects I suggest that you might want to go a little further.

The first point in that connection is one you have already discussed this morning. It concerns the appointment of the special prosecutor by the Attorney General rather than a court. I don't have a clear view of the constitutional issue raised here. It simply seems to me that it's not necessary to involve the courts, as burdened as they are, in this particular duty.

The special prosecutors appointed in recent years by Attorneys General—Messrs. Cox, Jaworski, and Curran—I think were all distinguished holders of the responsibilities for special prosecution in the extraordinary circumstances giving rise to those appointments.

The other point that it seems to me you might wish to consider further is to limit the appointment of special prosecutors to situations in which the conduct involved would constitute a felony.

That I think, Mr. Chairman, may be a sufficient summary of my testimony. And I'd be very glad to respond to questions you or any member of the committee may have.

Senator COHEN. In other words, you question the wisdom, political or otherwise, of creating a mechanism through which we institutionalize a procedure for investigating and possibly prosecuting cases against high officials because, No. 1, you think it's not desirable, and, No. 2, it's not necessary. But having said that, you support whatever improvements are recommended by the subcommittee that reduce the unfairness that was inherent in the original act.

Is that a fair summary of what your beliefs are?

Mr. RICHARDSON. Very fair, very succinct. I congratulate you, Mr. Chairman. [Laughter.]

Senator COHEN. Some years ago you and I had a conversation about this, which goes all the way back to 1973, I believe, in which you raised the very same points. But you also indicated at that time that the toughest decision as the prosecutor is not when to prosecute—that's the easy one—the tougher decision is when not to prosecute. And I think that that's a view that you share. Those are the toughest cases, when it's a marginal case, and when you have other considerations involved which are political rather than judicial in nature, the appearance is that you're exercising your impartiality, impartiality as a member of the bar, as a member of the Cabinet, as the head of the Justice Department, that in your professional judgment you do not feel that the case should be prosecuted. Yet there may be circumstances under which the political questions would be such that you feel it necessary to go forward.

That's the "bend-over-backward" statement that Senator Eagleton was talking about. I believe you probably share that concern, that most prosecutors face that at some time in their career.

What the Ethics Act is designed to do is to ameliorate that situation, to take an Attorney General or his subordinates, some of them, out of that situation. Do you disagree with the need to do that?

Mr. RICHARDSON. I would say, Mr. Chairman, that to recognize the difficulty of such a problem is one thing. To say that it calls for a statutory remedy is quite another.

I think that the Senate, the President, the American public, are entitled to believe that an Attorney General confirmed by the Senate, appointed by the President, can be trusted to recognize such a problem when he sees it. And in a case where he doubts his own ability to deal with a situation in a matter that goes straight down the middle or where he recognizes that there may be a significant public question as to whether or not he can do this, he should either simply recuse himself and call upon his deputy or the chief of the Criminal Division or some other official of the Department, or, in extraordinary situations, as in the case of Watergate, appoint a special prosecutor.

When President Nixon asked me to be Attorney General in May 1973 he left totally to my discretion whether or not I should appoint a special prosecutor. I announced publicly several days later that I was going to do so—this was well before the actual confirmation hearings got underway—because I believed that the closeness of my association with the President and my previous appointments in other departments, given the magnitude of the case and the extent to which it called into question the integrity of the processes of the executive branch, did require the appointment of an independent prosecutor.

But I would submit that the circumstances which vest that responsibility in the Attorney General and which from time to time require him to conclude that public confidence would be strengthened by exercising discretion to rely on someone else better, contributes to the strengthening of public trust than an automatic rule predicated on the notion that the man in office at the time would not have the sense of responsibility or sensitivity to recognize such a situation when it arose. That is the issue, not the issue of balancing interests of public trust versus something else. The question is, what are the best means of strengthening the basic foundation of trust.

A free representative system of self-government can never enact enough rules or prescribe enough constraints to build trust. If you have to spell out every such thing in some mandatory statutory process, you have already confessed that there exists no foundation of trust.

Senator COHEN. How has the Justice Department been impugned or maligned or somehow the object of mistrust by this act?

Mr. RICHARDSON. I think the act as a whole, including some of its disclosure provisions, has contributed substantially to the enhancement of public cynicism in the United States. I do not believe that we have taken the right fork in the road.

The British would not conceive of dealing with situations of this kind in this way. They have built up instead a degree of reliance on the individual's sense of responsibility.

To take a different example, what about the bar? Does anyone think that the integrity of the bar must depend upon the existence of written canons of ethics? Has the integrity of the bar fallen to the point where we do not trust those who have responsibilities as lawyers to fulfill these responsibilities without having to look up what the fine print says about what they may or may not do?

Senator COHEN. Do you think we were misguided, then, in passing laws which determined when judges must disqualify themselves?

Mr. RICHARDSON. Basically, yes. I think the notion in the United States that you can legislate ethical conduct is fundamentally mistaken, and that the attempt to do so can only contribute to the erosion of the very foundations on which responsibility in the end must rest.

Senator COHEN. So in your judgment, then, we should never legislate modes of conduct for either the judiciary or for those in the Justice Department. We have to leave that up to an established body of unwritten law, such as the English, who have no written constitution?

The English, by the way, they have an entirely different situation. They have an Official Secrets Act. In relationship to the press, they have different libel rules and a much different system of justice in many ways.

Mr. RICHARDSON. The corollary, however, Mr. Chairman, should be that since they're more secretive than we are, they might well have been expected to be less trustful.

In our case, because we're so open, we might have been expected to be more trustful. The fact is that, although we are more open, we are also more suspicious and more prove to tie people down.

Senator COHEN. Should we be less open? If we're less open will it therefore follow that the public will be less suspicious of public conduct?

Mr. RICHARDSON. No. My own view is that the combination of openness and trust is the natural and the right way to go for our society. And I consider that the reactions to Watergate that are manifested in the notion that you can legislate against future Watergates by this kind of thing is fundamentally a wrong lesson to be drawn from it.

I think we should draw from Watergate the lesson that the institutions of the United States and the vigilance of the American people are sufficient, that there will be appointed special prosecutors for situations like this, that in the end the striking thing about Watergate, looking at it from one side, is not that some people did wrong, but that so many people—including judges and members of Congress, including your then-committee on the House side—did right.

Senator COHEN. Thank you.

Senator Levin.

Senator LEVIN. Do I understand your position to be, then, that we should repeal title 28, section 455, which does require disqualifi-

cation of judges because of their relationships to the parties before them?

Mr. RICHARDSON. I'm reminded, Senator Levin, of a story about a Supreme Court justice from your own State, the late——

Senator LEVIN. I hope he's not related to me because I have one who is.

Mr. RICHARDSON. I don't think so. I'm talking about the late Frank Murphy.

Justice Murphy wrote a ringing dissent in a freedom of speech and picketing case. It was circulated among the other justices. The court had divided five to four in conference. He ran into one of his brethren in the corridor who said, "Frank, that was a wonderful dissent you delivered in that freedom of speech and picketing case. I was so moved by it that I'm tempted to join you and that would give you a court." Murphy said, "Oh, don't do that. That was written as a dissent. I wouldn't want to see it become the law of the land." [Laughter.]

Senator LEVIN. We're sometimes in the same position in the Senate, I believe.

Putting that aside, would you——

Mr. RICHARDSON. What I would do if I were you I'm not sure. I think that the view I express is fundamentally right. It does worry me. But I won't repeat everything I've said.

Given where you sit right now, I'm not sure that the practical course is to propose a repeal of the act. But I do think, for the reasons I've stated and Senator Cohen has already summarized, that moves in the direction you're taking are moves in the right direction.

Senator LEVIN. Your faith in individual responsibility shines through in your testimony. And your suggestion about the code of ethics for lawyers, for instance, as I understand it, is that you should not adopt a code of ethics?

Mr. RICHARDSON. No, I don't think it does any great harm. But if you assume that you have a bar which is sailing as close to the line as possible and is constantly getting out the code of ethics to see whether what a lawyer is doing might step over the line, you're already—as my old boss would have said in a similar context, the system has already gone too far to save.

Senator LEVIN. Instead of the bar as a whole, we're talking about individuals just like you, true believers in individual responsibilities which are deeply reflected in your actions as well as your testimony.

There are individuals in the bar who are close to the line, individuals in the bar that are nowhere near it, or individuals in the bar who might be deterred by a code of ethics.

Mr. RICHARDSON. But all the code gets you in that case then is the opportunity to bring proceedings to disbar a lawyer. And the code may have some use in that connection. But I don't think there are many lawyers whom you or I would greatly respect who get up in the morning and take out the code of ethics to see what they can get away with that day.

Senator LEVIN. No, but I think there are lawyers who respect the code of ethics and, No. 2, lawyers would be expected to read that code of ethics to determine what is a proper thing for them to do. I

know, for instance, judges who torment themselves over the question of whether or not the person in front of them is related to a third degree or fourth degree, consequently as to what they should do.

There's got to be a line drawn somewhere: a fourth cousin or a third cousin or a fifth cousin or a friend of a fifth cousin. And you do get guidance from codes of ethics.

Mr. RICHARDSON. I think that the example you give, though, states the problem. Your trust in the end, really, ought to be on how the judge decides he should act in a case where maybe the guy is a first cousin who grew up in Australia with whom the judge has no connection at all. Conversely, the fifth cousin might also have been a law partner.

In any case, the basic point, I think, is that we must keep in view the essentiality of trust as a basic necessity—not merely a desirable goal but a necessity—for the effective functioning of a free society. And so the question is, as the chairman I think correctly stated: which course is better likely to contribute to it?

And I simply question whether we enhance our fulfillment of it by rules that seem to suppose that in the absence of those rules we would not be entitled to trust the behavior of the individual whom the rules are intended to constrain.

Senator COHEN. Senator Rudman.

Senator RUDMAN. Thank you, Mr. Chairman.

It's a pleasure to have you before this subcommittee this morning. Your point, of course, cannot truly be argued; your point being that we set up rules to prevent something, and that gives rise to the anticipation of people that something might have happened without the rules. One can't argue that point.

Mr. RICHARDSON. Well, may I interject a second?

Senator RUDMAN. Certainly.

Mr. RICHARDSON. There is a distinction, of course, between rules that proscribe or penalize levels of conduct falling way below the standards to which a civilized adult should be held.

Senator RUDMAN. Oh, I understand the distinction.

Mr. RICHARDSON. We're dealing here, therefore, with the upper range of an expected level of conduct rather than the minimum.

Senator RUDMAN. To address the very problem that you have spoken to this morning, I believe that the change in standard, assuming we have to have a law at all, which you of course might disagree with, but assuming for purposes of argument that we do, a change in standard here gives the Attorney General a great deal of authority and latitude. And essentially what we're really doing here is saying we do have a great deal of trust in the Attorney General of the United States, because, in the final analysis, he is making a decision on reasonable grounds to believe that further investigation or prosecution is warranted. Of course, as we all know, that is very broad language. Essentially he becomes the gate that either opens or closes, and we have to have a great deal of trust in him to do that. Once having made that decision, we can go a step further, I guess, by saying that at that point we really have to have some rules removed.

I had suggested in the course of the subcommittee hearings last year that, rather than having a special prosecutor—we were

having dialogs with the witnesses—that we maybe have the situation where the Attorney General picks a U.S. attorney from a district far removed from the district in which the problem existed.

I understand what you're saying. You're saying, could we do it within the framework of government? I expect we might be able to. But we seem to have a system going now that I don't think is going to change.

But, for instance, I expect you would agree with me that if there were a problem with the secretary of X here in the District of Columbia, the U.S. attorney for the district of New Hampshire or the district of Massachusetts, the district of Maine, could probably come down here working with the staff and the FBI, and do a fair and impartial job. Under your doctrine of trust you would expect him to. So that's the kind of system you're talking about.

Mr. RICHARDSON. Yes.

Well, of course, when I was the attorney general of Massachusetts, or the U.S. attorney, I had no hesitation about investigating or prosecuting officials in my own State. And that is, of course, quite a common thing.

But basically I agree with you.

Senator COHEN. But you were elected to that. Weren't you elected attorney general?

Mr. RICHARDSON. Yes; I was elected as attorney general, and I was an appointed U.S. attorney.

In any case, I agree with you basically, Senator Rudman, that the amendment that you propose for a degree of discretion by the Attorney General is, in a sense, declaratory of what I'm talking about.

The question really is, do you need it in a statute? If you are confirming an Attorney General you could ask him questions like, "Mr. So-and-so, we're interested, this committee is interested, in your view of how to deal with a situation in which various allegations have been made with respect to the possibility of criminal conduct on the part of the spouse of the President." And the nominee could tell you, could give you some indication of his or her approach to questions like this.

You would come out about at the same place.

Senator RUDMAN. From what I've seen up here, though, the kind of answer you get to that question is, "Well, I really would not like to engage in a hypothetical answer to a hypothetical case that might occur on some hypothetical date." That's the kind of answers we usually get up here; not from people like yourself.

Mr. RICHARDSON. Well, after all, Curran, Jaworski, and Cox all were special prosecutors appointed by an Attorney General who didn't have to appoint a special prosecutor.

The point is simply that the more sensible the rules you put into the statute, the more likely that a responsible and sensible officeholder would do these things anyway.

So the only remaining question, then, is, what is the residual risk that he or she will not do them, and what are the byproducts in terms of the aggregate impact on public trust? That would seem to me a statement of the central question.

Senator RUDMAN. Thank you very much for being here this morning. I appreciate your testimony.

Mr. RICHARDSON. Thank you very much for inviting me. It has been a pleasure.

Senator COHEN. Before you leave, Mr. Richardson, I just have one more comment to make.

When you raised the issue, you said that the system worked well in Watergate, and that's the lesson we ought to learn, that so many people did so many things right.

I don't think back often about those days, but I recall there were so many times when things could have gone wrong, and that it did in fact require your resignation somewhere along the line in order to move the system in the direction that it was supposed to work.

I can recall, for example, when you were up for confirmation as Attorney General. I would have been satisfied to have you, as Attorney General, investigate the allegations against the administration. I would have been satisfied that you would have carried out those responsibilities impartially and free from any political bias. The Senate at that time didn't agree, they insisted, as I recall, during the Judiciary Committee confirmation hearings, that a special prosecutor be appointed.

Mr. RICHARDSON. They didn't have to; I'd already announced that there would be.

Senator COHEN. Yes, I understand, but the political pressure was such that the system didn't trust anybody; they didn't care what your reputation was, or what your performance was. They didn't trust anybody at that time. It had to be independent.

Mr. RICHARDSON. Yes.

Senator COHEN. And I think that that was an example of where you're right: the system did in fact work. It worked for a number of reasons: No. 1, the person that you picked; No. 2, your own character during those very difficult times. And I cut you off. You were going to quote, as I recall, "Liberty lies in the hearts of men, and, when it dies, there is no constitution, no treaty, no law, no court." As long as it lives there, there is no need for constitution or treaty or court.

Mr. RICHARDSON. I knew I could count on you, Senator. I was simply paraphrasing that quotation, in effect, to incorporate, where he uses "liberty," "trust."

As to Watergate, in fairness, had I not already proposed to appoint a special prosecutor, it's certainly highly likely that the Judiciary Committee would have insisted on it. And it's further true, I think, that had anyone been proposed as a special prosecutor who did not have the qualities and character and experience to offer the prospect of performing the role with integrity, I think that the Senate and the public would have rebelled against that, too.

But there is obviously a far cry between that situation and the Kraft or Jordan situation and some others. And the question is really, therefore, at the margins, do you need to create some statutory mechanism to improve the chances that the right thing will be done. The impact, in any case, is only going to be at the margins.

Senator COHEN. Thank you very much.

Mr. RICHARDSON. Thank you.

[Mr. Richardson's prepared statement follows:]

PREPARED STATEMENT OF ELLIOT L. RICHARDSON

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to comment on S. 2059, a bill to amend the special prosecutor provisions of Title 28 of the United States Code, which were passed as part of the Ethics in Government Act of 1978. The key elements of the bill as I understand it, are to increase the threshold requirements which must be met before the appointment of a special prosecutor is required, and to modify the coverage of officials who are subject to the Act. Because I have served as a United States Attorney, as a State Attorney General, and as Attorney General of the United States, and because I was also responsible for the decision to appoint a special prosecutor for Watergate, I have had occasion to give some thought to the issues raised by the bill. I hope my perspective on these issues will be of some assistance to the Committee.

Accepting the basic premise of the special prosecutor law -- that a special statutory mechanism necessary to ensure impartial resolution of allegations against high government officials -- I am generally in accord with S. 2059. I think that the bill will cure many of the practical problems that have arisen in the administration of the special prosecutor provisions of the Ethics in Government Act over the last four years.

However, I must confess that I have serious doubts about the premise itself. The underlying assumption is that the Attorney General will be too loyal, too pliable, too

subject to outside influence to discharge his duty to investigate fully and fairly whenever an investigation touches upon a senior administration official. If, in fact, the American people generally share this assumption, the erosion of public trust in the integrity of our elected and appointed officials would already have progressed so far as to have fallen below the basic floor of confidence necessary to sustain the functioning of representative self-government.

I do not believe that this assumption is warranted, at least in the ordinary case. In most investigations involving administration officials, I simply cannot believe that it is not possible to find some impartial Department of Justice official who can be given sufficient independent authority, free from outside influence, to investigate the allegations fully, fairly, and properly. Some persons have suggested that the Hamilton Jordan and Tim Kraft investigations, for example, could have been handled in this manner, without invoking the cumbersome requirements currently called for by the special prosecutor law. And in the extraordinary case -- Teapot Dome, Watergate, and possibly the Carter peanut warehouse -- independent outside special prosecutors can be and have been appointed pursuant to the Department of Justice's general authority to employ outside counsel. Few have questioned the impartiality and independence of Messrs. Cox and Jaworski in the Watergate investigation, or Paul Curran in his investigation of the Carter peanut warehouse, even though none of these three men were appointed pursuant to the present special prosecutor law provided for in Title 28 of the United States Code.

In my view, even without a special prosecutor law the practical pressures brought to bear by the political system will guarantee that even the appearance of partiality will be avoided when senior administration officials are being investigated by the Department of Justice. The circumstances under which I appointed Archibald Cox to be special Watergate prosecutor clearly demonstrate this point, as does the immediate public outcry that followed my resignation and Professor Cox's discharge during the so-called "Saturday night massacre." These pressures of course led directly to the appointment of a second special prosecutor, Leon Jaworski. In the Jordan and Kraft investigations, on the other hand, no doubt the public's demand that even the appearance of partiality be avoided would have been met by the Attorney General's selection of someone at the Department of Justice who could have been given sufficient independent authority by the Attorney General to pursue adequately the allegations. Perhaps the Department of Justice official selected to conduct the investigation could be required to prepare and release a report summarizing the investigation's results, ensuring sufficient public disclosure and oversight to guarantee that any investigation be properly conducted. Such a requirement could be imposed by internal Department of Justice guidelines, however. It does not necessitate a formal special prosecutor law.

But I do recognize that, political realities being what they are, the special prosecutor law is likely to remain with us in some form. In view of that fact, my concerns about the special prosecutor provisions are greatly

ameliorated by S. 2059's improvements to the special prosecutor law. S. 2059 generally limits and restricts the law's applicability, and -- because I question the need for the law in the first place -- limiting it and restricting it is all to the good.

As the Ethics in Government Act now stands, whenever the Department of Justice is provided with "specific information" of a federal offense having been committed by an official who is covered by the Act, the Department must conduct a preliminary investigation. The preliminary investigation can last only for 90 days, and during that time the Department must decide whether the allegations are "so unsubstantiated" that no further investigation is warranted. If not, a special prosecutor must be appointed.

As these threshold requirements have been interpreted, only a tiny scrap of evidence will trigger the mandatory appointment of a special prosecutor. Non-meritorious allegations of minor misconduct involving an administration official can too easily invoke the special prosecutor provisions.

S. 2059 would raise the threshold conditions which must be met before a special prosecutor must be appointed. It would grant the Attorney General greater discretion than he now has to decide whether to invoke the cumbersome and costly special prosecutor provisions. An allegation of a significant federal violation, together with a fair degree of factual substantiation, would be required before an administration official could be subjected to a burdensome independent investigation. Allegations that might meet the

current "scintilla" test but that are essentially frivolous would no longer suffice to require the appointment of a special prosecutor. This change should minimize the unfair burden on an administration official who is faced with an independent investigation brought about by some false allegation that he violated a federal statute. It should also help save some of the substantial costs that the government must incur whenever a special prosecutor is appointed to conduct a lengthy investigation. While I do not know enough about the facts of the particular investigations to offer a fully informed opinion on the subject, it has been suggested that the allegations against Hamilton Jordan and Tim Kraft might not have required a special prosecutor to be appointed had the standards provided in S. 2059 then been in effect.

Because I believe that the applicability of the special prosecutor law should be restricted, I also agree with the changes made by S. 2059 with respect to the coverage of the law. I think that the Committee is absolutely correct in its perception that the law is too inclusive. The special prosecutor provisions cover many relatively low-level government officials whom the Department of Justice can investigate without raising any serious allegation that the investigation's outcome was altered by outside influences. The law is also too inclusive in that it imposes its investigatory requirements on many officials who have long since left government service, who have ceased exercising power over the government's decision-making processes. The Department of Justice therefore can investigate without suspicion of partiality.

At the same time, however, the law is also somewhat under-inclusive in that it omits members of the President's family whom the Department of Justice may not be able to investigate without being suspected of bias. I would not disagree with extending the special prosecutor law to cover them. Section 3 of S. 2059 in my view more accurately reflects the persons whom, and the time frame in which, the Department of Justice would have the most difficulty in investigating without appearing to be partial.

While supporting the increased threshold and diminished coverage requirements provided for in the bill, I nevertheless do not believe that it goes nearly far enough toward curing all the problems that I perceive to have been created by the Ethics in Government Act. In particular, I do not agree that a court, rather than the Attorney General, should be involved in the appointment of a special prosecutor. I venture no opinion on the constitutionality of involving the judiciary in the appointment process under separation of powers principles, which is a concern raised by members of the present administration. Rather, I simply fail to see any persuasive reason for involving the judiciary in the appointment decision, given the substantial burdens which that inevitably entails, and given that the Attorney General is quite capable of making a responsible decision to appoint or not to appoint a special prosecutor. The fact that the Attorney General is under a statutory duty to appoint a special prosecutor, and that his decision will be subject to intense public scrutiny, will suffice to ensure that the decision is made fairly and impartially.

In order to limit further the applicability of the special prosecutor law, I would also urge that the Committee consider amending S. 2059 to invoke the special prosecutor provisions only when conduct that would constitute a felony is alleged. The special prosecutor law as presently enacted can be too easily invoked not only by essentially specious factual claims, but also by accusations of minor, petty, technical offenses. Limiting the applicability of the special prosecutor law only to felonies should help to cure this problem. Alternatively, if the Committee is concerned about limiting the special prosecutor law only to felonies, it might consider making the Act applicable to misdemeanors only when the alleged misdemeanor involves misconduct at the very highest levels of government, for example, cabinet level or above. Another alternative might be to limit applicability of the special prosecutor law to felonies and only those misdemeanors that are alleged to have taken place in the course of official duties.

Other provisions of S. 2059 that I support include that portion of Section 5 that makes it clear that the special prosecutor has the full range of prosecutorial discretion normally accorded a federal prosecutor. It seems unfair to continue to burden an official with a special prosecutor's lengthy investigation if after review of the evidence the prosecutor concludes that the case is flimsy and unlikely to result in a conviction. When the investigation continues under those circumstances, the desire to avoid even the appearance of partiality has pushed the investigative process too far. It is equally wrong to continue to devote prosecutorial resources to a special

prosecutor's investigation if no United States Attorney's office in the country would bother to consume its scarce prosecutorial resources in investigating or prosecuting given the facts that have been alleged. Other equally persuasive reasons not to prosecute, or even to continue, an investigation, in the multitude of circumstances faced by a United States Attorney can easily be imagined. The special prosecutor should have complete freedom to consider those reasons and to decide based upon them to limit and restrict or even to end his investigation. Current prosecution policies followed by lawyers in the Department of Justice should provide sufficient guidance for the special prosecutor to follow in exercising the discretion accorded him by S. 2059.

To further restrict the applicability of the special prosecutor law, I would also support the extension provisions of S. 2059, which give the Attorney General an additional sixty days to conduct his preliminary investigation. Ninety days, the length of time currently allowed for a preliminary investigation, is in many cases too short a time to conduct a thorough preliminary investigation. I think it unfair and unwise to require administration officials to be subjected to the burden of and the adverse publicity resulting from a special prosecutor's investigation simply because the ninety day preliminary investigation period has expired. The additional sixty days should help to ameliorate this problem, so that the special prosecutor provisions are not invoked due to nothing more than the mere passage of time.

Another provision of S. 2059 with which I agree is the provision that reduces the showing that must be made before a special prosecutor can be discharged from "extraordinary impropriety" to "good cause." The "extraordinary impropriety" standard derives from the charter of independence for the special Watergate prosecutor that I proposed to the Senate Committee on the Judiciary in 1973 during the hearing on my nomination as Attorney General. That heightened standard was appropriate in the extraordinary circumstances of the Watergate investigation, but it need not be carried forward into the more routine situations covered by the special prosecutor law. Changing the discharge standard from "extraordinary impropriety" to "good cause" should also help to prevent a special prosecutor from engaging in the abuses to which his position might be directed. Moreover, availability of judicial review to test the legality of the discharge decision will ensure that the decision is not made for improper reasons.

I also agree with the provision of S. 2059 that permits a discretionary award of attorney's fees to the target of the special prosecutor's investigatory efforts. The public attention that inevitably focuses on a special prosecutor's investigation makes it likely that even when a special prosecutor uses the full discretion accorded him by S. 2059, the investigation will be conducted in a far more formal and thorough manner than a similar investigation conducted in a more ordinary fashion. The investigation will impose greater legal expenses on the investigation's target as a result. It seems unfair to impose those expenses on a target merely because of his high

administration position, if the investigation ultimately exonerates him.

In closing, I would like to say that in my view the Committee should not be hesitant to limit the scope and applicability of the special prosecutor law, as S. 2059 does. Speaking as a former Attorney General, I do not consider the law to be an affront to the independence or integrity of that position, as some have claimed. The recusal procedures which I have briefly outlined, coupled with the ability to appoint independent outside special prosecutors such as Professor Cox when it is necessary to do so, provide the same insulation from the Attorney General's office and from his decision-making. But it is the availability of these alternative mechanisms for ensuring the impartiality of investigations into allegations of misconduct at the highest level of government which in my view makes the special prosecutor law unnecessary, and which leads me to conclude that the law's scope and applicability can be restricted without undue fear of the consequences.

Thank you, Mr. Chairman. I would be happy to answer any questions which the Committee may have.

Senator COHEN. Our next witness is Lloyd Cutler, former counsel to the President.

He testified on the special prosecutor law last year at our oversight hearing. I want to say this, Mr. Cutler, the subcommittee is certainly indebted to you for your suggestions for amendments, most of which were incorporated in S. 2059. Last year you said that although you were one of the fathers of the special prosecutor law you did not like the child that had emerged. We hope that by the amendments that have been proposed by the subcommittee we can yet make you a proud father.

Mr. CUTLER. I like it much better now. I don't think I deserve parentage, but I'm certainly willing to accept it as it now stands, Mr. Chairman.

TESTIMONY OF LLOYD N. CUTLER, FORMER COUNSEL TO THE PRESIDENT

Mr. CUTLER. I am accompanied by Zoe Baird, who served in the office of legal counsel in the Department of Justice and then with me in the White House legal counsel's office.

I won't bother to read my statement, Mr. Chairman. As you know from looking through it, I do support this bill and I support the continuation of special prosecutor legislation.

I think we've come a long way since the hearings a year ago. We now have general agreement, even from those who demur to the bill, that Attorneys General and other high officials of the Justice Department should recuse themselves in cases of the categories covered by the existing law and with the changes made in your recent amendments.

The issue now has come down to the issue of whether recusal should be mandated by a statute setting forth specific rules and providing for a method of appointing an independent counsel or whether it should be left to the discretion of the Attorney General.

It seems to me it's good to come to grips on that issue, and that the answer to that issue is very, very clear and indicated by what Congress has done and what the bar has done and what, incidentally, the British have done in comparable cases. We've now had this special prosecutor law for 4 years. In that time there have been only three occasions on which a special prosecutor was in fact appointed. And up to now at least, although one matter is still pending, no special prosecutor has in fact filed an indictment.

At the same time I believe that the public concern that led to the enactment of the special prosecutor statute has been enormously alleviated. There is no public concern today, because of the existence of this statute, that in matters covered by the statute, justice will not be done. I think if the statute were to be allowed to expire, as the Justice Department suggests, all of that concern would immediately arise again.

We might never have needed such a statute if all Attorneys General had been like Elliot Richardson, although even he, as you will remember in the *Agnew* case, although he was able to successfully prosecute a sitting Vice President of the United States, it was a rather near thing and it depended almost entirely on the enormous public admiration for his own integrity and standards of conduct.

Watergate did happen. There is no way we can undo that. And as you've just pointed out, Mr. Chairman, while the results are a tribute to how well our system works, in this respect, at least, it was a very near thing. And the two immediate predecessors of Mr. Richardson certainly themselves were not capable—to put it charitably—of coping with the problem.

The British, incidentally, do have a formal system. As usual it is unwritten. But the Office of Public Prosecutor in Britain, which brings all criminal cases, including those against high government officials, is a civil service office. It is administered by the Attorney General who is a member of the Cabinet, but it would be regarded as a gross impropriety in Britain—and it has happened in Britain and was regarded as a gross impropriety—for the Attorney General to make a decision one way or the other as to who should be prosecuted or who should not, or even to attempt to influence that process. And we saw how well that system worked in the prosecution of Mr. Jeremy Thorpe, a political leader of an opposition party.

It seems to me that it's absurd to have a situation where Congress has indeed required by statute that the Attorney General disqualify himself in a case against IBM or A.T. & T. just because he owns some shares of stock in the company or because his law firm either represented that company or has sued it in the past—and both Attorney General Levi and Attorney General Smith did that in those cases—but to permit him to participate in a case against his fellow Cabinet member, as we now have, the Secretary of Labor.

And as you've pointed out, and as Senator Eagleton has pointed out, the existence of this mechanism is just as important in preserving public confidence in the decision not to prosecute, and in assuring the target of an investigation that that decision will be based on the legal merits of the charge alone, as it is in assuring public confidence in the case where a decision to prosecute is made.

We have talked almost entirely about the cases where an administration is investigating one of its own members or participants. Remember also, we have transitions. And we have the case in which the incoming administration has an opportunity in a political sense to get even with the other side which had tormented it so much in the past. That's another aspect of this special prosecutor or independent counsel legislation that's extremely important in my judgment.

Let me return for a moment to this issue of whether we should mandate the rule. As Senator Levin pointed out, we do mandate the rules on the disqualification of judges; 28 United States Code, section 455 is explicit. The Code of Judicial Conduct adopted by the judicial conference is explicit. And it lists a category of cases, situations of relationship not too dissimilar from the categories that you have in the special prosecutor law as you would amend it in your bill, in which disqualification is required. That obviously has nothing to do with the judge's internal capacity to decide a case fairly, even though he may own a few shares of stock or even though he may have some degree of relationship; it's a matter of appearances. But we require it in order to preserve faith in the system.

And the great contribution made by this law is that for the first time by statute it has recognized that a political conflict of interest or its appearance can be just as disqualifying and just as damaging to public trust as a financial or personal conflict of interest.

I approve very much the changes you have made in this, many of which alleviate the problems in the original special prosecutor law that gave many, including myself, so many difficulties and did make it extremely harsh on Government officials who were the unhappy target of an accusation by someone or other. I won't stop to discuss any of those in detail unless you'd like to go into them. I agree with everything you've done, and some of the things you refuse to do, in particular the fact that you did not limit the law to charges of felonies. It seems to me since we're dealing with appearances of conflict, the failure to prosecute a misdemeanor like a drug offense for political reasons can be just as damaging as the failure to prosecute a felony.

I especially praise the provision you have put in to allow reimbursement of the additional attorneys' fees of the target of an investigation who——

Senator COHEN. Could you stop there and expand on that, because I think Senator Rudman would share that view. We didn't get into that very much when Mr. Giuliani testified. The Justice Department is opposed to reimbursement for attorneys' fees. That's one point I'd like you to elaborate on, as to why that's necessary.

Mr. CUTLER. It seems to me that we have a special prosecutor law to reassure the public that much as some targets of investigations like this, like Secretary Donovan might wish to have a Special Prosecutor so that there will be no doubt about public acceptance of the outcome, the cost to a public official of defending himself against such a charge is absolutely enormous in proportion to his salary. All of us are lawyers, we know what legal fees amount to these days.

We should not excuse or relieve a public official of the cost of defending himself that any other person would be subjected to. But one inevitable consequence of the appointment of a special prosecutor or independent counsel is a repetition of going over ground that has already been gone over, and a very substantial increase in the amount of time the target and his lawyer must spend on the matter. So no matter what the outcome, it's clear to me, at least, that the appointment of an independent counsel increases the cost to the individual and that since that is done primarily for the benefit of the public, the public ought to bear that additional cost, at least in the circumstance where no indictment is brought in the end.

Mr. Giuliani said there is no precedent for any other criminal defendant being reimbursed for his fees or part of them. Technically that may be true. But with respect, I would say in principle, that is not correct because we do have the criminal indigent act and the Government does pay for legal fees of defendants in Federal criminal cases who cannot afford to hire their own counsel.

I don't want to suggest that Government officials are indigent, but their salaries in proportion to the costs of counsel of the quality necessary to defend them in cases of the type that are brought against a high public official come very, very close to that. Certain-

ly there would be no new departure for the Government to appoint and pay counsel at the request of the target in such a case. It seems to me much simpler to do what you have done and let him pick his own counsel and let the court reimburse him for the amount, at least the additional amount of legal expenses that he incurs.

Senator RUDMAN. They may not be indigent when it starts, but they probably are when it's over.

Mr. CUTLER. Or they would at least have to write a book and donate the royalties to cover the expenses. [Laughter.]

I do know in Hamilton Jordan's case that his legal fees by the time it was over—although I'm sure his counsel would certainly lean over backward and did not charge corporate rates or anything like that—would amount to several times his Government salary.

Senator RUDMAN. Mr. Cutler, I'm going to have to leave, and I wanted to wait until you were finished. Do you have some additional comments?

Mr. CUTLER. I just wanted to bring up one other point, Mr. Rudman, related to your constitutional question——

Senator RUDMAN. That was my question. If you would comment on that I'd be very grateful.

Mr. CUTLER. Yes.

I agree with your constitutional analysis. I think in the end especially with the amendments you have now made that any prosecutor hereafter appointed could not—is unlikely to have been held ultimately to have been unconstitutionally appointed. I am less sure about cases under the existing law.

As you know in Mr. Kraft's case, his counsel was prepared to raise and litigate this issue. And it is at least conceivable that he might have won it. In the end no indictment was brought so it was academic.

I recommended—it seems to me there is no necessity for the court to appoint the Special Prosecutor. I recommended the last time that since it is very awkward and time consuming for a new special prosecutor to be appointed by the President or the Attorney General, subject to confirmation by the Senate, that it would be much simpler and achieve all of the goals just as well if perhaps you called for the appointment by the President or the Attorney General of a panel, let us say, of six distinguished lawyers, all to be confirmed by the Senate and perhaps serving for staggered terms so they would overlap over periods of years, who would be available when the time came under the standards of your statute for the appointment of a special prosecutor. I think that would probably be a better way to go about it than to leave the appointment to a court, although I do think in the ultimate constitutional test what you said is correct, that especially under the new statute that method of appointment would also be sustained.

Senator RUDMAN. Mr. Cutler, thank you very much. Your testimony was very helpful this morning.

Senator COHEN. Thank you, Senator.

I'd like to just touch upon a point raised by Mr. Giuliani about written guidelines as opposed to unwritten guidelines. Is that a legitimate distinction? Can the Justice Department make a case, for example, saying, "We don't want to be on record in writing saying

that we don't normally prosecute cases of possession of small amounts of cocaine or other drugs"?

Mr. CUTLER. I think he made a good point, Mr. Chairman, and that his suggestion of using the word "establish" is a good solution.

I believe the Department tries to have guidelines for prosecutors in most kinds of cases. But it may be there are well understood policies that have never been written down. And it would easily be possible to establish or to show to the satisfaction of the special prosecutor and the court that a particular policy was established even though not written.

Senator COHEN. Of course, the attorney general would have to certify that to the court, that that is in fact an established policy——

Mr. CUTLER. That's right.

Senator COHEN [continuing]. Within the Justice Department. Of course, they could choose to make that report public. So I suppose there's no real way around the dilemma, as far as the Justice Department is concerned, as to whether they want to have it expressly understood that there will be no prosecution of possession of small amounts of drugs.

Mr. CUTLER. Yes, I can think of cases, for example, in what is now referred to as graymail, the issue of whether to proceed with prosecution when the testimony offered by the defendant may prejudice national security where perhaps the policies would not be written but yet be well established.

Senator COHEN. Senator Eagleton had to leave and he wanted me to ask one question in his behalf. It dealt with a change in the name from "special prosecutor" to "independent counsel" being much more than simply cosmetic. The question he wanted to ask you is whether the special prosecutor always conjures up Watergate and serious crimes, while the purpose of this statute is to deal with much more mundane types of situations?

Senator Eagleton wanted to ask whether or not you think you might reach the stage under the statute when the press and the public reaction reflected an understanding that the appointment of a special prosecutor or independent counsel does not convey guilt nor is it tantamount to an indictment. It is simply a prearranged way of assurring that high-ranking people are investigated. Will this ever be viewed as becoming routine rather than a dramatic investigation into a situation where the target is presumed to be guilty?

Mr. CUTLER. I doubt that it will ever become routine. If a high Government official or Presidential relative is involved it's news, it's news of a very high quality. And the more corrupt the crime, the more fascinating it will be to the public at large.

I like "independent counsel." I would be just as happy, perhaps more happy with special counsel, because independent counsel carries the negative pregnant that the Attorney General and the Department of Justice are not independent where, of course, in most cases personally they are.

Senator COHEN. If you call it special then can we conclude you're not very special?

Mr. CUTLER. Well, I don't think that matters much. But the individual can be damaged long before the issue of prosecution even

arises. An accusation at this table to your committee or some other committee about an individual can be just as sensational and just as damaging. I think you've gone about as far as you can and that the public is beginning to understand.

It's interesting that in the Jordan case the press and I think the public generally came to the conclusion that there was nothing to the charge even before it was referred to the special prosecutor.

Senator COHEN. Mr. Cutler, thank you very much, not only for your past help but for sitting through almost 2½ grueling hours of testimony this morning listening to all of us here. You've really been very helpful in formulating some of the issues and focusing on some of the suggestions. And we thank you very much.

Mr. CUTLER. Thank you, Mr. Chairman. It's one of my favorite subjects.

[Mr. Cutler's prepared statement follows:]

PREPARED STATEMENT OF LLOYD N. CUTLER

Mr. Chairman and Members of the Subcommittee:

It is with great pleasure that I come before this Subcommittee to testify on the subject of S. 2059, a bill to amend the special prosecutor provisions of the Ethics in Government Act of 1978. I commend this Subcommittee, and in particular Senators Cohen and Levin, for your persistence in endeavoring to ensure that the law continues to deal with apparent conflicts of interest on the part of the Attorney General in matters involving allegations of criminal conduct by high-level government officials by providing a mechanism for appointing a responsible independent counsel to investigate and, if necessary, prosecute such cases. I am certain that if Congress were to allow the special prosecutor system we now have in place to expire under the sunset provisions of the statute itself without substitution of some modified system, there would be tremendous public concern.

As you recall, in my testimony on May 20, 1981, I urged this Subcommittee to continue in force a law similar to the special prosecutor provisions of the Ethics in Government Act of 1978 to prevent the harm to the public trust that results from the appearance of conflict of interest if allegations of criminal conduct against those close to the President are investigated solely by the President's own lawyer, the Attorney General. This does not reflect any lack of confidence in the integrity or capability of the Attorney General as an institution or in any particular incum-

bent of that office. Rather it is a practical recognition of the fact that all members of our law enforcement system have a responsibility to recuse themselves from pursuit of matters in which they have an actual or apparent conflict of interest.

Inherent in the fact that the Attorney General is a presidential appointee and a member of the Cabinet of this political branch of government, is the notion that he will appear to be torn between prosecuting those close to the President and preventing prosecution so as to prevent embarrassment to his Administration. It is absurd for Congress to require an Attorney General to disqualify himself from a case against AT&T or IBM because he owns a few shares of stock or because his law firm once represented the company, but to permit him to participate in a case against his fellow Cabinet member, the Secretary of Labor. I believe the existence of an independent counsel mechanism is just as important to preserving public confidence in the Attorney General's decision that a matter is <u>not</u> one warranting referral to an independent counsel, as it is to assuring satisfaction with the outcome of cases referred to independent counsel.

Just as we have a formalized system to govern the disqualification of judges -- 28 U.S.C. § 455 and the Code of Judicial Conduct adopted by the Judicial Conference -- a formalized system of recusal is necessary in the prosecuting context because every allegation of criminal conduct by a high level government official or member of the President's immediate family presents the potential for an appearance of conflict of interest -- and the Attorney General's decision

whether to involve independent counsel will be credible only if made in the context of a statute such as the one before us. The great contribution to public trust in Government made by the special prosecutor law was that for the first time it expressly recognized that a political conflict of interest or its appearance can be and should be just as disabling as a financial or personal conflict of interest. 28 U.S.C. § 528. There can be no doubt that in all such cases, the Attorney General has at least the appearance of a political conflict.

S. 2059 is an excellent bill. It reflects thoughtful consideration of the few problems that did arise from the existing system. I believe this bill corrects the three major shortcomings of the existing special prosecutor provisions. First, S. 2059 provides the Attorney General with the appropriate level of discretion in determining whether to seek independent counsel. Second, the bill provides the possibility of relief from the burdensome costs of attorney's fees for subjects of these investigations against whom no indictment is sought. Third, the potential for unequally harsh treatment of subjects of the law as compared to targets of regular criminal investigations is ameliorated by the provisions of this bill. It does all this in the context of a moderate 5-year extension of the law, thereby encouraging reconsideration of the modified system in a few years.

The amendments to the mechanism triggering referral to an independent counsel contained in S. 2059 gives the Attorney General the discretion to decline pursuit of alle-

gations where it would be unreasonable to expect that criminal conduct was committed or where the Department of Justice has established policies of nonprosecution for the type of circumstances involved. These provisions restore the appropriate presumption of innocence that is lacking in the current special prosecutor provisions. Currently, in order to avoid referral to a special prosecutor, the Attorney General is required to find the evidence "so unsubstantiated that no further investigation or prosecution is warranted," or to conclude that the allegations do not state the elements of a crime. The amendments remedy this by requiring the Attorney General to make a threshold determination that the information received by the Department "is sufficient to constitute grounds to investigate," and by providing that, at the end of the preliminary investigation, the Attorney General will make a judgment call as to whether there are "reasonable grounds to believe that further investigation or prosecution is warranted."

The provision for Government reimbursement of attorney's fees contained in S. 2059 ameliorates a terrific hardship that otherwise befalls subjects of these investigations. It is one thing to be subjected to a more extensive investigation than that which would be conducted of an ordinary citizen; this enhanced scrutiny is a reasonable demand to make of those who hold high public office. But the additional legal cost of defending against this enhanced scrutiny is quite another matter. Without a reimbursement provision such as you have included, a statute designed to promote ethics in government might actually promote the converse by creating the possibility that public officials will become

indebted to those who provide legal services without charge or help to finance the legal costs of their defense.

The need for the provision of attorney's fees has not been dissipated by the other proposed amendments to the existing law. The amendment makes clear that fees will be awarded only in those cases where they "would not have been incurred but for the requirements of this chapter." Even if the other amendments to the law will terminate investigations more in keeping with ordinary criminal investigations, there will continue to be cases where a referral will be needed, and this will inevitably result in some duplication of the work already done and require additional legal services by the subject's counsel. For example, the current special prosecutor investigation of Secretary of Labor Donovan might well meet the standards requiring referral to an independent counsel under the amended law, and would also be an appropriate matter for an award of attorney's fees if an indictment is not brought.

Finally, let me comment on your wise inclusion of members of the President's immediate family in the coverage of this law. We learned from the investigation of Billy Carter's assocation with Libyans that members of the President's family can be subject to extensive public scrutiny of their activities and to skepticism about the propriety of the Attorney General supervising any investigation into allegations of criminal conduct by such individuals. Coverage of family members is necessary for two reasons. First, the appearance of conflict of interest is at least as great as for the high

government officials now covered by the law. Second, coverage of family members will give more public credibility to a decision not to prosecute, whether made by the Attorney General under the standards of the amended Act or by independent counsel after a referral. There is every reason to think that even-handedness in prosecutorial judgments -- one way or the other -- is enhanced by the special prosecutor law, and this will benefit the family member.

Senator COHEN. Our final witness today is Mr. Robert Evans. He is from the government relations at the Office of the American Bar Association. The ABA has played a central role in the development of the special prosecutor law and has recommended special prosecutor mechanisms as early as 1976.

Mr. Evans, we're pleased to have you with us today. And if you can, please try and summarize your testimony. It will be inserted in full in the record.

TESTIMONY OF ROBERT D. EVANS, AMERICAN BAR ASSOCIATION

Mr. EVANS. Thank you, Mr. Chairman. I will indeed attempt to summarize.

I'm here at the request of our president to voice to you our very strong support for retention of the special prosecutor legislation, which we consider very important to the whole subject of integrity in government, and also to voice our support for several of the provisions of your bill S. 2059, which we believe would refine and improve the functioning of this important statute.

As you have indicated, we have had a long history with this legislation, and in fact my appearance today is the eighth by association witnesses since 1976, which is an accurate reflection of our degree of concern with the legislation.

We believe the act has served well its purpose of insuring public confidence in the integrity of law enforcement investigations involving those extraordinary cases in which high ranking Government officials are accused of criminal misconduct while preserving the central role of the Department of Justice as the Federal Government's principal law enforcement body. I want to emphasize this latter point, which has come up in the testimony of some of the other witnesses this morning.

We believe that the issue of accountability is central to any system for insuring Government integrity, and that primary responsibility for assuring the impartial administration of justice should reside in the Attorney General. And for this reason and others we have rejected suggestions that a permanent office of special prosecutor be created.

At the same time, however, the association was and is very cognizant of the necessity of preserving public confidence in the administration of justice. As stated in section 1.2 of our Standards for the Administration of Criminal Justice:

It is of utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office.

And for that reason we have supported the establishment of a statutory mechanism for the appointment of a temporary special prosecutor. For that reason also we have recommended that the appointment be done by a special court of appointment rather than by the Attorney General.

This approach has raised some concerns about the constitutionality of the legislation. I have discussed the constitutional issue in some detail in my testimony, and I won't go over that here today unless you would like me to. But we believe that the statute as presently drafted is fully constitutional.

There have also been suggestions that the experience with the special prosecutor mechanism during the past 4 years indicates that the statute should be either abandoned or seriously cut back in scope. The most frequent recommendation in this regard is that the crimes which would trigger the special prosecutor mechanism be limited to those involving official fraud or corruption or some standard of that nature. We oppose these recommendations. We are pleased that your subcommittee in its report of last October and also in your new bill has likewise taken that approach.

As Mr. Cutler pointed out, in the 4-year history of the act there have only been three special prosecutors appointed. This is out of a total of 11 cases in which a special prosecutor was considered for appointment. We do not believe that is an excessive number. The fact that two of the cases in which special prosecutors have been appointed were drug cases rather than official corruption matters is not to us a point of great significance. Our concern, as I said before, is that any implications of impropriety or conflict of interest should be avoided. The conflict arises out of the nature of the relationship between the prosecutor and the alleged violator, and there would be a conflict whether the crime is the most heinous or a relatively insignificant violation.

We do not believe, for example, that an implication of partiality would be present if the Attorney General investigated the White House Chief of Staff for election law violations but would not be present if it were a drug possession matter. The public perception of the justice system will be the same in either case. And it is a perception which we can ill-afford to foster.

We do believe, however, that improvements can be made in the act, and that S. 2059 makes several excellent recommendations for improvements. Specifically I would mention that in section 3, the changes in coverage of officials under the act by including family members is a very appropriate addition based upon a conflict of interest standard. The removal of certain lower-level Government officials from the act's coverage we believe does not damage the basic scheme of the Act and will help insure that the act is indeed limited to extraordinary cases.

The current section 4 standards for determining whether a preliminary investigation is required and for appointment of a special prosecutor are ones which we specifically recommended to this subcommittee in testimony we submitted last year. Both suggested changes in the language will give the Attorney General greater dis-

cretion and will likely avoid the necessity of naming the special prosecutor in very marginal cases. And we support these changes.

We also support the section 5 proposal to permit the preliminary investigation to be extended for a period of 60 days. Since the beginning we have recommended that the 90-day period might create an undue hardship on the Attorney General. Some means of expanding that time frame would be appropriate.

We also believe that it is appropriate to apply the Department's prosecutorial guidelines, as you have done in section 6, to the office of special prosecutor.

The only exception we take to the provisions of S. 2059 is the section 6(d) recommendation regarding removal of the special prosecutor by the Attorney General, that it be for good cause rather than the current standard of extraordinary impropriety or physical or mental disability.

Senator COHEN. Why do you disagree with that?

Mr. EVANS. We think that you're dealing here with extraordinary cases. The very fact that we have recommended that the prosecution be done by someone other than the Attorney General is a reflection of that.

Senator COHEN. But isn't that in and of itself a safeguard? You've got somebody that's separated from the Justice Department, who has been granted independence from political influence, is appointed by a court, has no ties to the administration, and give them the same sort of discretionary authority that other investigators would have, prosecutors would have and the same causes for removal. Plus the fact that if he were to be removed for good cause he could always appeal, and he's got political pressure, Members of the Senate and the House who would raise a good deal of Cain, I suppose, if they thought this were being done for partisan or political reasons.

Why isn't that enough?

Mr. EVANS. I think many of the arguments you've voiced apply also to the appointment, the original appointment process, as has been discussed here a great deal this morning. The statute is designed in large part to deal with public perceptions of the integrity of the process, and it's our concern that if you permit the Attorney General to come back in at some point, and for a standard which we view as being marginal and judgmental, good cause, the public perception of what is being done will not be——

Senator COHEN. The Attorney General would have to articulate what the good cause is.

Mr. EVANS. Well, he would.

Senator COHEN. That would go to the court, would it not?

Mr. EVANS. Yes.

Senator COHEN. That would be subject to appeal through the court itself.

Mr. EVANS. It certainly could.

As I say, though, I think good cause is something that is in the eye of the beholder. In any prosecution there could be second-guessing of prosecutorial decisions. And if that is a basis upon which the Attorney General could cause the removal, that is something that we would be opposed to. We think the extraordinary impropriety

test is an appropriate one in these kinds of cases, and would favor the retention of it.

But, on balance, I do believe S. 2059 is a very responsible and responsive piece of legislation that should be enacted. It preserves the essential features of a very important statute, and makes appropriate adjustments and improvements in it.

We commend you for the legislation, and urge that it be enacted.

Senator COHEN. Thank you very much for your testimony. We appreciate your support and the ABA's attendance at these hearings.

[Mr. Evans' prepared statement follows:]

PREPARED STATEMENT OF ROBERT D. EVANS

Mr. Chairman and Members of the Subcommittee:

I am Robert D. Evans, the Acting Director of the Governmental Affairs Office of the American Bar Association. I appear before you at the request of our President, David R. Brink, to convey the Association's views with respect to the special prosecutor provisions of the Ethics in Government Act and S.2059, the "Ethics in Government Act Amendments of 1982."

The Association created a Special Committee to Study Federal Law Enforcement Agencies in 1973, whose purpose was to "explore ways to make the law enforcement agencies professionally independent legal arms of the government by insulating them from partisan influences." The Special Committee, which was chaired by the late William B. Spann, Jr., of Atlanta, Georgia, focused its attention on the Departments of Justice and Treasury, including examination of the Federal Bureau of Investigation and the Internal Revenue Service. Professor Herbert S. Miller served as the Reporter/Consultant to the Special Committee, and I was its Staff Director.

After extensive research, review of congressional hearing records, and interviews with then-Attorney General Levi and other top-level government officals involved in federal law enforcement activities, the Special Committee in February, 1976, brought to the ABA's policy-making body, the House of Delegates, a series of twenty recommendations designed to prevent improper influence on federal law enforcement agencies. One of the most important of these recommendations was that a statutory mechanism be established which would permit "the appointment of a temporary

special prosecutor by the Attorney General or by a special Court of Appointment under carefully defined circumstances and standards." The House of Delegates overwhelmingly approved that recommendation, a copy of which is attached to my testimony, and the Association worked diligently thereafter to obtain enactment of legislation creating such a mechanism.

We were very pleased that such a mechanism was provided in the Ethics in Government Act when it was enacted in 1978. We believe the Act has served well its purpose of ensuring public confidence in the integrity of law enforcement investigations involving those extraordinary cases in which high-ranking government officials are accused of criminal misconduct, while preserving the central role of the Department of Justice as the federal government's principal law enforcement body.

I want to emphasize this latter point regarding the role of the Department of Justice because it was a pervasive theme running through all of the Special Committee's recommendations. The Commiftee strongly believed that the issue of accountability was central to any system for ensuring government integrity, and that "(p)rimary responsibility for assuring the impartial administration of justice should reside in the Attorney General...." For this reason and others, the Committee rejected the suggestions that a permanent office of special prosecutor be created. As former Special Prosecutor Archibald Cox stated in the 1975 Report of the Watergate Special Prosecution Fo1 "Setting up a separate organization would dilute the President's responsibility and the responsibility of those under him. That would be a great mistake."

At the same time, the American Bar Association was and is most cognizant of the necessity of preserving public con-

fidence in the administration of justice. As stated in Section 1.2 of the ABA's Standards for the Administration of Criminal Justice,

> "It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office."

Such a circumstance, the Association believes, arises when the Department of Justice is called upon to investigate the conduct of the President, of Cabinet and other high-ranking policy officials appointed by the President, and of high-ranking members of the staff of the Department of Justice. As stated in Humphrey's Executor v. U.S., 295 U.S. 602 (1935), "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."

Following the same line of reasoning, the ABA concluded that the power to appoint a special prosecutor in extraordinary cases involving implications of partiality and conflict of interest should lie in someone other than the Attorney General. The ABA and Congress both concluded that it would be desirable to provide for court appointment of the special prosecutor. This provision has caused some persons to contend that the statute may not be constitutional. We submitted last year a memorandum on this subject prepared by Professor Herbert S. Miller. I will not attempt to cover the same ground here but will briefly summarize the principal points discussed in his memorandum:

1. Article II, Section 2 of the U.S. Constitution provides that "the Congress may by Law vest the Appointment of such Inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

2. The Supreme Court has ruled that the designation of which authority should appoint inferior officers is one which rests with Congress, and that unless there exists an incongruity between the duties to be performed and the appointing power such "as to excuse the courts from its performance, or ... render their acts void," the appointment will be valid.

3. Prosecuting attorneys have been held in numerous cases to be "quasi-judicial officials," and a congressional decision to provide for the appointment by the district court of U.S. Attorneys when vacancies occur has been specifically upheld.

4. The term "inferior officer" is generally interpreted to mean an officer who is not specifically enumerated in the Constitution.

5. As the court's powers extend only to making the appointment and delineating the jurisdiction of the special prosecutor with respect to the matter to be investigated, the statute would not create an unconsitutional interference with the discretion of the prosecutor in violation of the separation of powers doctrine of the Constitution.

Thus, the American Bar Association is of the view that the special prosecutor provisions of the Ethics in Government Act are constitutional and are highly desirable as a mechanism for ensuring the accountability of public officals and public trust in the law enforcement system.

There have been suggestions that the experience with the special prosecutor mechanism during the past four years indicates that the statute should be either abandoned or seriously cut back in scope. The most frequent recommendation is that the crimes which would trigger the special prosecutor mechanism

be limited to those involving official fraud or corruption in office. We oppose these recommendations and are pleased that your Subcommittee, in its report of last October 26, and S.2059 do not take this approach.

The criticism of the statute stems in large part from the fact that the only two instances in which special prosecutors have been appointed under the Act have been cases involving crimes of a relatively minor nature: alleged possession and use of cocaine. It is significant to note, however, that as of the time your Subcommittee's report was published last October, there had been six other cases in which the preliminary investigation process under the statute had been initiated and in which no special prosecutor was appointed. Thus, appointment of a special prosecutor has been far from automatic.

The fact that the two cases in which special prosecutors were appointed were drug cases and not official corruption cases is not to us a point of great significance. As stated above, our concern has been to ensure that any implications of impropriety or conflict of interest are avoided. The conflict arises out of the nature of the relationship between the prosecutor and the alleged violator and is a conflict whether the alleged crime is the most heinous or is a relatively insignificant violation. To suggest that personal ties will make a difference in felony matters but not in misdemeanors, for example, is a proposition which we cannot support. To suggest that there will be an "implication of partiality" if the Attorney General investigates the White House chief of staff for election law violations but not if the investigation is for drug possession is not tenable. The public perception

of the justice system will be the same in either case, and it is a perception which we can ill afford to foster.

It should be noted that in the Watergate situation, the initial charges involving White House officials appeared to have nothing to do with corruption in office. They had to do with breaking and entering, a very mundane crime. It is the potential for conflict of interest and the appearance of impropriety, not the nature of the offense, which cries out for independent investigation in such instances.

It should also be noted that in both the instances in which a special prosecutor was appointed under this Act, the public accepted completely the findings of the special prosecutors that there were no criminal violations. We seriously doubt that this would have been the case had the Department of Justice conducted the investigations internally.

This does not mean, however, that improvements cannot be made in the Act. We believe that S.2059 makes several excellent recommendations for improvements in the Act and quite adequately deals with the major concerns which have been voiced about the application of the Act.

The change in name provided in Section 2, from "special prosecutor" to "independent counsel," will, we believe, more appropriately reflect the investigatory nature of the position and not carry with it the suggestion to the public that a prosecution of the government official is preordained.

The changes in coverage of officials in Section 3 also are beneficial changes which better target the individuals with whom the Act should be concerned. In particular, the addition of family members of the President is a clearly appropriate addition based upon a conflict of interest standard.

The removal of certain lower level government officials from the Act's coverage does not damage the basic scheme of the Act and will help ensure that the Act is, indeed, limited to extraordinary cases.

The current Section 4 standards for determining whether a preliminary investigation is required and for appointment of a special prosecutor are ones which we specifically recommended to this Subcommittee last year be raised. Both suggested changes in language will give the Attorney General greater discretion and will likely avoid the necessity of naming of a special prosecutor in very marginal cases. We support these changes.

We also support the Section 5 proposal to permit the preliminary investigation to be extended for 60 days. We have consistently testified that we felt the 90-day limitation worked an undue hardship on the Attorney General and that a special prosecutor might be needlessly appointed because there was inadequate time to complete an investigation.

We have taken no official position with respect to the issue of award of attorneys' fees in this situation, although we generally favor expanded use of fee shifting.

With respect to Section 6, we have previously testified in support of the recommendation that the special prosecutor be subject to the prosecutorial guidelines of the Department. The guidelines are a well-established and well-regarded set of criteria for conducting investigations and are entirely appropriate for application to the special prosecutor.

The only exception we take to the provisions of S.2059 is the section 6(d) recommendation that the standard for

removal of the special prosecutor by the Attorney General be for "good cause" rather than "extraordinary improprieties." We believe a stringent standard is necessary to ensure the independence of the special prosecutor. Since the special prosecutor is given a very specific and very limited jurisdiction at the time of appointment, there is little likelihood of a "runaway" special prosecutor. The imposition of the Department of Justice guidelines for prosecution will serve as a further check on the special prosecutor. The "good cause" standard applicable to removal of the heads of independent agencies is too lax a standard to apply to the person chosen to conduct extremely sensitive criminal investigations.

In balance, however, we are of the view that S.2059 is a very responsible and responsive piece of legislation which should be enacted. It preserves the essential features of a very important statute and makes appropriate adjustments and improvements in it. We commend the sponsors of the legislation for their thoughtful and creative work and urge that S.2059 be approved.

EXHIBIT A

RECOMMENDATIONS ADOPTED BY THE
AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES
February, 1976

Special Prosecutor

The establishment of a permanent office of special prosecutor is opposed. Congress should enact legislation authorizing the appointment of a temporary special prosecutor by the Attorney General or by a special Court of Appointment under carefully defined circumstances and standards. The special Court should consist of three retired senior federal circuit court judges appointed by the Chief Justice for a two year term.

The temporary special prosecutor would, under such legislation, be appointed and removed in the following manner:

1. The Attorney General would be required to inform the Court of Appointment of action taken in any matter where appointment of a temporary special prosecutor was considered by the Attorney General in accordance with the standards. A memorandum to the Court would include a statement of facts, legal conclusions, and the decision. The Attorney General could either appoint the special prosecutor, find that an appointment was not required, or request the Court to make an appointment. After a review of the memorandum the Court could take whatever action it deemed necessary, including the appointment of a different individual as temporary special prosecutor if in the Court's view the individual appointed by the Attorney General does not meet the standards. In such instances the special prosecutor appointed by the Court would supersede the one appointed by the Attorney General.

2. The Court could act on its own authority when in its judgment the standards require appointment of a temporary special prosecutor.

3. When the Attorney General appoints a temporary special prosecutor the memorandum to the Court would delineate the jurisdiction of the special prosecutor. This statement of jurisdiction would be reviewed by the Court and modified

where necessary. When the Court makes the appointment it would delineate the jurisdiction.

4. The temporary special prosecutor should be subject to removal by the Attorney General for cause. A statutory guideline of "extraordinary improprieties" or a similar standard should be provided for removal decisions. This decision should be subject to immediate review by the Court.

A temporary special prosecutor appointed by the Attorney General or by the Court should have the same powers as the Attorney General or a U.S. Attorney in prosecuting a case.

Circumstances and standards to guide the appointing authority should include the following:

1. Conflicts of interest, implications of partiality, or alleged misconduct as delineated in the ABA Standards Relating to the Prosecution and Defense Function;

2. Appearance of professional impropriety as delineated in Canon 9 of the ABA Code of Professional Responsibility; and

3. Improper influence or obstruction of justice as defined in 18 U.S.C. 1501-1510.

Prosecuting Government Crimes

Congress should enact legislation creating a new Division of Government Crimes in the Department of Justice. It should be headed by an Assistant Attorney General nominated by the President and subject to Senate confirmation. Its jurisdiction should include violation of federal laws by government officials, cases referred by the Federal Election Commission, and violations of federal campaign laws.

Senator COHEN. The meeting stands adjourned.
[Whereupon, at 12 noon, the subcommittee was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

97TH CONGRESS
2D SESSION

S. 2059

To change the coverage of officials and the standards for the appointment of a special prosecutor in the special prosecutor provisions of the Ethics in Government Act of 1978, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3 (legislative day, JANUARY 25), 1982

Mr. COHEN (for himself and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To change the coverage of officials and the standards for the appointment of a special prosecutor in the special prosecutor provisions of the Ethics in Government Act of 1978, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Ethics in Government Act Amendments of 1982".

SEC. 2. (a)(1) Chapter 39 of title 28 of the United States Code is amended by—

(A) striking out "special prosecutor" wherever it appears and inserting in lieu thereof "independent counsel"; and

(B) striking out "special prosecutor's" wherever it appears and inserting in lieu thereof "independent counsel's".

(2) The tables of chapters for title 28 of the United States Code and for part II of title 28 are amended by striking out the item relating to chapter 39 and inserting in lieu thereof the following new item:

"39. Independent Counsel.".

(b)(1) Section 49 of title 28 of the United States Code is amended by—

(A) striking out "special prosecutor" wherever it appears and inserting in lieu thereof "independent counsel";

(B) striking out "special prosecutors" wherever it appears and inserting in lieu thereof "independent counsels"; and

(C) striking out "special prosecutor's" wherever it appears and inserting in lieu thereof "independent counsel's".

(2) The item for section 49 in the table of sections for chapter 3 of title 28 of the United States Code is amended by striking out "special prosecutors" and inserting in lieu thereof "independent counsels".

(c) Title VI of the Ethics in Government Act of 1978 is amended—

(1) by striking out "SPECIAL PROSECUTOR" in the heading for section 601 and inserting in lieu thereof "INDEPENDENT COUNSEL";

(2) by striking out "special prosecutors" in subsection (c) of section 601 and inserting in lieu thereof "independent counsels"; and

(2) by striking out "SPECIAL PROSECUTORS" in the heading for section 602 and inserting in lieu thereof "INDEPENDENT COUNSELS".

SEC. 3. Paragraphs (3) through (6) of subsection (b) of section 591 of title 28 of the United States Code are amended to read as follows:

"(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5315 of title 5;

"(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

"(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

"(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency;

"(7) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director; and

"(8) the President's spouse, the President's children and their spouses, and the President's parents, brothers and sisters and their spouses during the incumbency of the President.".

SEC. 4. (a) Section 591(a) of title 28 of the United States Code is amended by striking out "specific information" and by inserting in lieu thereof "information sufficient to constitute grounds to investigate".

(b) Section 592 (a) of title 28 of the United States Code is amended to read as follows:

"(a)(1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in section 591(a) of this title, the Attorney General shall conduct, for a period not to exceed ninety days,

such preliminary investigation of the matter as the Attorney General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

"(A) the degree of specificity of the information received, and

"(B) the credibility of the source of the information.

"(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpenas.".

(c) Section 592(b)(1) of title 28, United States Code, is amended by striking out "finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted" and inserting in lieu thereof "that there are no reasonable grounds to believe that further investigation or prosecution is warranted".

(d) Section 592(c)(1) of title 28, United States Code, is amended—

(1) by striking out "finds that the matter warrants further investigation or prosecution" and inserting in lieu thereof "finds reasonable grounds to believe that further investigation or prosecution is warranted";

(2) by striking out "that the matter is so unsubstantiated as not to warrant further investigation or

prosecution" and inserting in lieu thereof "that there are no reasonable grounds to believe that further investigation or prosecution is warranted"; and

(3) by adding at the end thereof the following new sentence: "In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Attorney General shall comply with the written policies of the Department of Justice with respect to the enforcement of criminal laws.".

(e) Section 592(c)(2) of title 28, United States Code, is amended by striking out "specific information" and inserting in lieu thereof "information sufficient to constitute grounds to investigate".

SEC. 5. Section 593 of title 28 of the United States Code is amended by adding at the end thereof the following new subsections:

"(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

"(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reim-

bursement for the attorney's fees incurred by such subject during such investigation if—

"(1) no indictment is brought against such subject; and

"(2) the attorney's fees would not have been incurred but for the requirements of this chapter.".

SEC. 6. (a) Subsection (a) of section 594 of title 28 of the United States Code is amended by—

(1) striking out "and" at the end of paragraph (8);

(2) striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding after paragraph (9) the following:

"(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.".

(b) Subsection (f) of section 594 of title 28 of the United States Code is amended by striking out "to the extent that such special prosecutor deems appropriate" and inserting in lieu thereof "except where not possible".

(c) Section 594 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection:

"(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without

conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written policies of the Department of Justice with respect to the enforcement of criminal laws.".

(d) Paragraph (1) of subsection (a) of section 596 of title 28 of the United States Code is amended by striking out "extraordinary impropriety" and inserting in lieu thereof "good cause".

SEC. 7. Section 598 of title 28 of the United States Code is amended by striking out "after the date of enactment of this chapter" and inserting in lieu thereof "after the date of enactment of the Ethics in Government Act Amendments of 1982".

THE ETHICS IN GOVERNMENT ACT AMENDMENTS OF 1982

Section-by-Section Analysis

SHORT TITLE

The first section sets forth the short title of this bill, the Ethics in Government Act Amendments of 1982.

SECTION 2: NAME OF SPECIAL PROSECUTOR

Section 2 would change the name of the special prosecutor to "independent counsel" in order to reduce the stigma of, and remove the Watergate connotation from, a special prosecutor investigation and to more accurately describe the purpose of appointing an individual to conduct an investigation.

SECTION 3: COVERAGE

Section 3 would amend the coverage of officials who are potential subjects of the special prosecutor process.

First, the present law (Section 591) would be amended to reduce coverage of middle-level Executive officials who, because they are close to neither Presidential nor Department of Justice decision-making, do not present realistic dangers of conflict of interest. Under the proposed amendments, the President, Vice-President, Cabinet members, Director and Deputy Director of the Central Intelligence Agency, Commissioner of the Internal Revenue Service, and positions in the Department of Justice at or above Level III of the Executive Schedule would continue to be covered. The amendments would limit coverage of officials in the Executive Office of the President to Level II or above of the Executive Schedule rather than Level IV or above, as under present law.

Section 3 would more precisely define which campaign "officers" are subject to the act by specifically covering the chairman and treasurer of the principal national campaign committee seeking election or reelection of the President and any other official of the campaign exercising authority at the national level, such as the campaign manager or director. The present law's coverage of campaign officials (Section 591(b)(6)) is vague and overinclusive by not limiting coverage to only officers who hold positions of authority.

Section 3 would extend coverage to family members of the President for only the incumbency of the President. Under present law, family members of the President are not covered.

This section also would reduce and standardize the length of time during which Executive officials remain subject to the act. Under Section 591(b)(5) of the present law, an official remains covered for the entire incumbency of the President under which he serves and the full term or terms of the next President if the new President is of the same political party. Thus, an official can remain subject to the act for as long as 16 years after he or she leaves public office. The proposed amendment would cover all Executive officials for the incumbency of the President under which they serve plus one year, regardless of which political party holds the presidency.

SECTION 4: STANDARDS FOR CONDUCTING A PRELIMINARY INVESTIGATION AND APPOINTING A SPECIAL PROSECUTOR

Section 4(a) and (b) would raise the present standard for determining whether a preliminary investigation is required. The proposed amendment states that "upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate" that any person covered by the act has violated a federal criminal law, the Attorney General must conduct a preliminary investigation. The proposed amendment stipulates that in determining whether "grounds to investigate" exist, the Attorney General shall consider the degree of specificity of the information and the credibility of the source of the allegation. The proposed standard differs from Section 592 of the present law which does not enable the Attorney General to consider the credibility of the accuser, but rather provides that a preliminary investigation must be conducted whenever the Attorney General receives "specific information" that a covered official has violated a federal criminal law. This standard can result in preliminary investigations for allegations with little or no factual merit.

Section 4(b) adds a new section 592(a)(2) to the statute. This is a clarifying amendment which provides that in conducting the preliminary investigation the Attorney General has no authority to convene grand juries, plea bargain, grant immunity or

issue subpoenas. Although the legislative history of the act expressly denies these powers to the Attorney General, the act itself is silent on this issue, thus giving rise to varying interpretations on the permissible extent of the preliminary investigation.

Section (c)–(d) would raise the standard for appointment of a special prosecutor to require appointment if the Attorney General "finds reasonable grounds to believe that further investigation or prosecution is warranted." The amendment directs the Attorney General to comply with written policies of the Department of Justice with respect to the enforcement of criminal laws in determining whether reasonable grounds for further investigation or prosecution exist.

The present law (Section 592(b)–(c)) requires appointment unless the Attorney General concludes that the matter under investigation "is so unsubstantiated that no further investigation or prosecution is warranted." This trigger of appointment is almost automatic, leaving little practical opportunity for the Attorney General to dismiss allegations supported by little or no factual support. The standard also fails to incorporate the prosecutorial guidelines and policies of the Department of Justice, and requires a special prosecutor investigation even for offenses which would not be prosecuted if made by an ordinary citizen. By ignoring the standardized policies of the Department, the act imposes a different, more stringent application of criminal law on public officials.

SECTION 5: EXTENSION OF PRELIMINARY INVESTIGATION AND REIMBURSEMENT OF ATTORNEY'S FEES

Section 5 provides that the Special Prosecutor Division of the court may, upon a showing of good cause by the Attorney General, grant a single extension of the preliminary investigation for a period not to exceed 60 days. The present law (592(a)) places a 90-day limitation on the preliminary investigation with no provision for extension. This strict 90-day limitation may force the Attorney General to seek appointment of a special prosecutor simply because the 90-day period was too short.

Section 5 also would allow the court to grant, at its discretion, reimbursement of attorney's fees to subjects of a special prosecutor investigation if no indictment is brought and if the fees would not have been incurred but for the special prosecutor appointment. No provision for reimbursement exists in the present law and officials may incur extensive legal fees during an investigation by a special prosecutor. The proposed amendment would not allow reimbursement for expenses incurred during a preliminary investigation as even private citizens would be subject to this type of investigation.

SECTION 6: POWERS AND REMOVAL OF THE SPECIAL PROSECUTOR

Section 6(a) would authorize the special prosecutor to consult with the U.S. Attorney for the district in which the violation of criminal law was alleged to have occurred. Although this is not prohibited under present law, the proposed amendment would expressly authorize the special prosecutor to do so in order to assist him in determining the policy of the particular jurisdiction regarding prosecution of the alleged offense.

Section 6(b) would require the special prosecutor to follow the prosecutorial guidelines of the Department of Justice. Section 594(f) of the present law requires the special prosecutor to comply with the written policies of the Department "to the extent that the special prosecutor deems appropriate." Section 6(b) would amend this section to require compliance "except where not possible" in order to create a presumption that the special prosecutor will follow prosecutorial guidelines.

Section 6(c) states that the special prosecutor shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written policies of the Department of Justice. Although this is permissible under present law, the proposed amendment clarifies this authority so that special prosecutors will not unduly prolong investigations.

Section 6(d) of the bill would provide for removal of the special prosecutor by the Attorney General for "good cause," a standard which is used for removal of the heads of independent agencies. The amendment would not change the present law's provisions for full reports to Congress upon removing a special prosecutor and opportunity for judicial review of such removal; these are maintained as checks against interference by the Attorney General in the independence of the special prosecutor.

The present law (Section 596(a)(1)) provides for removal by the Attorney General only on the grounds of "extraordinary impropriety" or mental or physical disability.

SECTION 7: EXPIRATION OF THE SPECIAL PROSECUTOR PROVISIONS

Section 7 would extend the sunset date of the act to five years after the adoption of these amendments.

The present law (Section 598) provides that the special prosecutor provisions will expire in October, 1983, unless otherwise extended by Congress.

Department of Justice

STATEMENT

OF

RUDOLPH GIULIANI
ASSOCIATE ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
UNITED STATES SENATE

CONCERNING

SPECIAL PROSECUTOR PROVISION
OF THE ETHICS IN GOVERNMENT ACT OF 1978

ON

MAY 22, 1981

Statement of Rudolph Giuliani, Associate Attorney General
Before the Senate Committee on Governmental Affairs
Subcommittee on Oversight of Government Management
May 22, 1981

Mr. Chairman:

Thank you very much for inviting me to testify before this Committee on behalf of the Department of Justice concerning the Special Prosecutor provisions of the Ethics in Government Act of 1978. While the Department fully appreciates the circumstances and sentiments which lead to the passage of this legislation, it is our firm belief that the present legislation raises serious constitutional questions, presents several practical problems and gives rise to substantial unfairness in its application. Accordingly, the Department urges that Congress seriously consider repeal of the provisions. Short of outright repeal, the Department urges that Congress amend the provisions in accordance with the recommendations made in this statement. However, in no event should the statute be reenacted in any form so as to extend it beyond 1983, when by the Act's "sunset" provision, it will expire.

The Committee has asked that my statement address specific issues concerning the Special Prosecutor legislation. This statement will address each of these issues and I will be pleased to answer any questions the Committee might have.

1. Role of the Department of Justice in the Jordan and Kraft Cases.

The two cases to date in which a Special Prosecutor has been appointed pursuant to the Ethics in Government Act involved allegations of drug use by Hamilton Jordan and Tim Kraft. Upon receipt of the allegation in each case, the preliminary investigation was conducted by the Federal Bureau of Investigation under the direction of attorneys from the Criminal Division of the Department of Justice. The preliminary investigations generally consisted of interviews of all available witnesses to the alleged drug use and the review of pertinent documents. The Attorney General analyzed the results of each investigation and within 90 days after receipt of the allegation, filed Reports as required by 28 U.S.C. 592(c) seeking appointment of a Special Prosecutor.

In each case, upon the filing of the Report, the Department ceased all investigative efforts on the matter. In both investigations the Special Prosecutor requested the full-time assistance of government investigators. Arthur Christy, the Special Prosecutor in the Jordan matter, was provided two FBI Special Agents and one DEA Special Agent. Mr. Gallinghouse, the Special Prosecutor in the Kraft matter, was provided two FBI Special Agents full time and six other Special Agents on a part-time basis. In each case the government investigators worked under the sole direction and control of the Special Prosecutor. Other than providing the requested investigators and all requested funds, the Department of Justice played no role in either investigation. Specific data concerning the specific Department of Justice resources devoted to

each investigation has previously been provided to the Subcommittee in response to Senator Cohen's letter of April 20, 1981, to the Attorney General.

2. Views of the Department on the Efficacy to Date of the Statute.

In the two and one-half years since the passage of the statute, there have been two Special Prosecutors appointed and several other instances in which statutory preliminary investigations have been conducted with no subsequent appointment of a Special Prosecutor being sought. In every instance in which the Act has been triggered the matter has been removed from the normal channels of prosecutorial discretion. In some of the matters, however, it is likely that the application of normal prosecutorial standards would not have led to an investigation because the triggering information or the person providing such information lacked credibility, or because the matter was not sufficiently aggravated to warrant investigation.

In each instance, because of the strict time limitations in the statute, the preliminary investigation took priority over other existing matters. The statute, of course, requires that all covered investigations be treated as highest priority whether or not the allegation would otherwise warrant such treatment. Obviously, this has diverted scarce investigative, prosecutive and financial resources away from other pressing matters.

In the two cases in which Special Prosecutors were appointed, neither allegation would have received such intensive, resource-draining investigation under normal Department standards. It is extremely rare for the federal government to conduct a full-scale grand jury investigation to determine whether an individual used marijuana or cocaine on a specific occasion, particularly where the allegations are received well after the fact, are of dubious credibility and, will not lead to seizure of any drugs or money related to the purchase and sale of drugs. In both cases, however, the statute mandated full preliminary investigations and the appointment of a Special Prosecutor, who virtually duplicated the preliminary investigation. In both cases, the targets were subjected to great expense and damage to their reputations, only to be cleared at the end. The Department believes that individuals should not be subjected to this sort of treatment merely because they hold public office. On the contrary, our system of justice is premised upon equal treatment of all individuals, a principle which, in the cases at issue, was in great measure turned on its head.

Thus, the experience of the Department to date indicates that the Act can do more harm than good. It effects a misallocation of priorities, subjects individuals to great unfairness and is wasteful of scarce resources, both public and private.

3. Views of the Department on Policies Underlying the Special Prosecutor Provisions.

Criminal investigations should be conducted solely on their merits in a climate free of improper influences. To the extent that Congress

sought to achieve this end in the Ethics in Government Act, its intent was laudable. In the Department's view, however, Congress sought to achieve this end through means which are impractical and which give rise to substantial unfairness.

There is simply no need for the extremely cumbersome mechanism created by the Act. The Attorney General is the chief federal law enforcement officer of the United States. The criminal justice system is premised on the good judgment and integrity of the Attorney General and his delegates. For the investigation and prosecution of every other federal offense, ranging from treason and murder to petty misdemeanors, the system depends, quite properly, on the integrity of Department of Justice personnel. The assumption upon which the Special Prosecutor law is premised — that the Department of Justice should not be trusted to investigate or prosecute certain federal offenses — is simply unfounded.

The Department recognizes that even if there is no actual conflict of interest in most situations, many people feel that the appearance of conflict alone is enough to justify the statutory Special Prosecutor procedures. In almost all situations where appearance questions are raised, however, the dangers of conflict are more apparent than real. There is no basis for assuming that Department of Justice personnel cannot fairly and thoroughly investigate crimes by public officials. Given the tremendous costs of routine, automatic Special Prosecutor appointments in terms of reputations, fairness, time and money, the speculative "appearance" problems are not sufficiently compelling to justify the present statutory problems. Where a reasonable danger of conflict might exist it can always be handled by individual disqualification or, in the most egregious cases, by resort to non-mandatory temporary Special Prosecutors such as were used in Watergate or the Carter Warehouse investigation.

The law as presently written, however, removes virtually all discretion from the process and requires a mandatory preliminary criminal investigation, and often the appointment of a Special Prosecutor, regardless of any reasonable chance of conflict and regardless of whether the matter warrants an investigation. Until such time as there is sufficient evidence to warrant such inefficient and unfair procedures, the conduct of such investigations and prosecutions should be returned to those professionals in the Department of Justice who are best equipped to handle them.

I have already alluded to the unfairness which can result from the application of the Special Prosecutor provision. By removing normal prosecutorial standards and discretion from the criminal investigative process and by eliminating any credibility standards for factual allegations, the Act sought to eliminate the possibility of improperly motivated prosecutorial decisions. But by enacting these extraordinary and unprecedented procedures, Congress singled out certain persons and crimes for investigation and prosecution in circumstances in which investigation and prosecution would not normally proceed. The effect is to subject public officials with extremely vulnerable reputations to the stigma and expense of criminal investigations in circumstances where,

absent the statute, criminal investigations would probably not be warranted.

An innocent person can never emerge whole from a criminal investigation even when it results in a decision not to prosecute. This may be the price society pays for an open criminal justice system which provides due process at all stages and a free press. But where normal standards of prosecutorial discretion are eliminated for a certain class of cases and the added stigma and publicity of a "Special Prosecutor" is present, the cost to innocent people becomes greater than is necessary and serious questions of fairness and justice must be raised.

The only two Special Prosecutor investigations to date appear to support this conclusion. A notion often proffered in support of the statutory procedures, that only a Special Prosecutor can credibly clear a suspect, simply does not stand up on closer reflection. Whether intended or not, the appointment of a Special Prosecutor invariably gives credence and added significance in the public eye to otherwise weak or insignificant allegations. The damage done to innocent people is clearly aggravated rather than alleviated by the statutory mechanism. It is doubtful whether the two subjects of Special Prosecutor investigations to date are grateful that they had a Special Prosecutor investigate and "clear" them.

Still another element of unfairness is presented by the statute. Targets of federal investigations not subject to the Act are protected by formal and informal Department of Justice policies and precedents and by the fact that ultimately everyone in the Department of Justice can be held accountable for any impropriety or incompetence. Targets of a Special Prosecutor have no such protection. A Special Prosecutor is bound by no internal policies or precedents in the conduct of investigations and answers to no one except in cases of extraordinary impropriety. Whereas accountability to rules and individuals is considered essential in all other aspects of democratic governance, the statute decides that the wholly speculative possibility of a conflict of interest outweighs the need for any accountability. The Act sets up a system of independent Special Prosecutors who possess the same powers as Presidentially appointed and legislatively confirmed United States Attorneys and Attorneys General with none of the myriad checks and balances that today control prosecutorial discretion and action. Such a departure from normal accountability standards, so important in the particularly delicate area of criminal investigation and prosecution, is inconsistent with our democratic traditions and carries great potential for individual unfairness. The justification for such measures — speculative appearance problems — is simply insufficient to justify the measures adopted.

4. Views of the Department Concerning the Constitutionality of the Special Prosecutor Provisions.

In a letter to the Senate Legal Counsel dated April 17, 1981, the Attorney General expressed serious reservations about the constitutionality of the Special Prosecutor provisions. A copy of that letter is attached as Appendix A. I would like to elaborate further on

the constitutional questions which are difficult and not readily answered, given the lack of authoritative Supreme Court rulings on the relevant points.

I begin, however, with some basic principles. Ordinarily, the President, as the head of the Executive Branch, has the constitutional authority both to appoint and to remove all officials exercising executive functions. 1/ The prosecution of federal offenses is a core executive function within the exclusive prerogative of the Attorney General and ultimately the President. 2/ For that reason, federal prosecutors, like all other officers exercising executive functions, must be accountable to the President, the Attorney General, or both. The Department's constitutional reservations with respect to the Special Prosecutor Act derive in substantial part from the fact that the Act removes the responsibility for enforcement of the federal criminal laws from the Executive Branch and lodges it in an officer who is neither appointed by, accountable to, nor, save in extraordinary circumstances, removable by the Attorney General or the President. This office, moreover, may set its own prosecutive standards, investigate, try and appeal any case and take any legal position in the name of the United States without the consent of the President, the Attorney General or the Solicitor General. In form, the Special Prosecutor is an officer of the Department of Justice. In reality, he exercises executive functions in a matter wholly independent of the Department or the Executive Branch. Such a role is difficult to square with the fundamental design of the Constitution.

It is true that under Art. 2, §2, cl. 2, of the United States Constitution--the so-called "Appointments Clause"--Congress is authorized to vest the power to appoint "such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The appointment provision of the Special Prosecutor Act is an attempted exercise of Congress' power to vest appointment authority in the "Courts of Law." The Appointments Clause, however, like all provisions of the Constitution, must be read in conformity with the general constitutional principle of separation of powers. For example, the Department does not believe that it could plausibly be argued that the Appointments Clause, despite its literal terms, allows Congress to vest the appointment of Cabinet-level officials in the federal courts. For this reason, the Appointments Clause must be read to allow judicial appointment only when that method of appointment would not undermine the separation of powers among the three branches.

1/ See Myers v. United States, 272 U.S. 52 (1926).

2/ United States v. Nixon, 418 U.S. 683, 693 (1977).

In the principal case dealing with the scope of the Clause, Ex parte Siebold, 100 U.S. 371 (1879), Congress vested in the courts the power to appoint election supervisors. The Court rejected the argument that the congressional action was unconstitutional because the supervisors exercised some executive functions. The Court noting that it "is no doubt usual and proper to vest the appointment of inferior officers in that department of the government . . . to which the duties of such officers appertain," the court concluded that "there is no absolute requirement to this effect in the Constitution." Id. at 397. At the same time, however, the Court emphasized that "in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." Id. at 397-98. Indeed, "[n]either the President, nor any head of department, could have been equally competent to the task" of appointing election supervisors. Id. at 398. 3/

In our view, the Siebold decision is by no means controlling when evaluating the constitutionality of the Special Prosecutor provisions. Siebold did not involve appointment of a criminal prosecutor, who exercises purely executive functions. Further, we believe that there are at least some circumstances in which the courts would regard judicial appointment of a prosecutor--who has virtually unlimited discretion over the prosecution of a wide range of public officials for a host of alleged criminal violations--as creating the kind of "incongruity" against which the Court warned in Siebold.

The Act's restrictions on the President's removal power are also highly questionable. As the Supreme Court stated in the leading case of Myers v. United States, 272 U.S. 52, 121 (1926), a restriction on the removal power is generally "a much greater limitation upon the Executive branch and a much more serious blending of the legislative with the Executive than a rejection of a proposed appointment." Myers articulated the basic proposition, unquestioned in any subsequent case, that the President has the constitutional power to remove at his pleasure any official exercising purely executive functions, and that a congressional infringement on the removal power with respect to such officials is constitutionally impermissible. 4/ If the Special Prosecutor exercises purely executive functions-- and it seems plain

3/ See also United States v. Solomon, 216 F.Supp. 835 (S.D.N.Y. 1963) (upholding authority of the district court to appoint U.S. Attorneys in cases where temporary vacancies occur); Hobson v. Hansen, 265 F.Supp. 902, 911-16 (D.D.C. 1967).

4/ Congress has been permitted to restrict removal of officials who do not exercise purely executive functions. See Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Executor v. United States 295 U.S. 602 (1935).

that he does--the restrictions on the President's removal powers are highly questionable, and may be justified, if at all, only by reference to the distinctive nature of the duties that the Special Prosecutor is called upon to perform.

The Supreme Court has indicated that limitations on the removal power might be justifiable when limited to extraordinary circumstances that make presidential control inappropriate. See United States v. Perkins, 116 U.S. 483 (1886); Myers v. United States, supra, 272 U.S. at 162; n.4 supra. 5/

Thus, the cases provide some support for the view that a restriction on the removal power may not, in circumstances involving a tangible and significant conflict of interest, be an impermissible infringement on Executive authority.

However, the Supreme Court has never upheld an Act of Congress that purported to prevent the President from discharging officers performing purely executive functions. Indeed, Myers suggests a general rule that any such Act would be unconstitutional. Therefore, we believe the Court might refuse to uphold the Special Prosecutor Act in light of the fact that it is the exclusive constitutional duty of the President to execute criminal laws. The grant of executive power solely to the President contains no exceptions--not even for conflict of interest cases. Therefore, I have serious reservations about the constitutionality of those provisions of the Act that deprive the President of powers to appoint, supervise, or remove the Special Prosecutor.

My constitutional reservations apply with particular strength to the breadth of the Act, which covers a range of Executive Branch officials in addition to the President, the Vice-President, advisers in the White House, the Attorney General, and high-level Justice Department employees. The necessary appearance of a conflict of interest may not be present in the case of many of those serving at Level III or IV of the Executive Schedule. For this reason, portions of the Act might well be unconstitutional as applied to those officials. Similarly, I believe that serious unconstitutional questions are raised by the Act's broad coverage of all crimes other than "a petty offense."

5/ I note that Congress properly concluded that removal power under the Act should not be vested in the courts, for that power would imply supervision over the Special Prosecutor's functions and perhaps impermissibly blend the prosecutorial and judicial tasks. See United States v. Solomon, 216 F.Supp. 235 (S.D.N.Y. 1963).

In concluding my discussion of the constitutional issues, I emphasize that although there are respectable arguments for the constitutionality of the Act on its face, the cumulative effect of the limits on the appointment and removal power, the absence of any Executive branch control of the exercise of exclusively executive functions, the breadth of the persons embraced by the Act, and the virtually unlimited scope of the criminal acts covered raise serious constitutional doubts about the Act as a whole. Of course, only a ruling by the Supreme Court would definitely resolve the constitutional issues. It is clear, however, that the Act has constitutional deficiencies in some or all of its applications and should be replaced with a statute that more closely conforms to constitutional principles of separation of powers.

5. Recommended Changes in the Statute.

Assuming arguendo that Congress wishes to retain a statutory Special Prosecutor mechanism, there are certain aspects of the statutory scheme which should be modified in order to bolster its constitutionality, to achieve Congress' intent more precisely, and to make the procedures more just. Following is a summary of proposed amendments to the Special Prosecutor provisions of the Ethics in Government Act which would preserve the core purpose of the statute while eliminating many of the problems. It is the Department's position, however, that the Act should in no event be reenacted in any form so as to extend it beyond 1983, when by the Act's "sunset" provision, the Act will expire.

A. Appointment of the Special Prosecutor

The relevant portions of the Ethics in Government Act require the Chief Justice of the United States to assign three judges or justices to a special division of the Court of Appeals for the District of Columbia Circuit. The function of this special division is to appoint a Special Prosecutor when properly requested to do so. See 28 U.S.C. 593. Thus, the Special Prosecutor provisions establish a mechanism whereby a prosecutor is appointed not by the President, the Attorney General or any other officer of the Executive Branch, but rather by three judges, officers of the Judicial Branch.

The mechanism for court appointment, taken together with the serious limitations on the removal power, create the most serious constitutional reservations concerning the Special Prosecutor provisions. I have already summarized the Department's constitutional reservations and I will not repeat them, except to note that the appointment mechanism appears to violate the principle of separation of powers by lodging outside the Executive Branch the power to appoint officers who perform the core executive function of prosecuting federal crimes.

The Department of Justice recommends that the power to appoint a Special Prosecutor be lodged in the Attorney General. If the Attorney General is the subject of the investigation, the Deputy Attorney General would appoint the Special Prosecutor. Such an amendment, together with an amendment empowering the Attorney General to remove the Special

Prosecutor on a showing of "good cause," would dispel much of the constitutional doubt concerning the statute. Moreover, it would serve to bring the prosecutive function into the Executive Branch, and specifically, into the Department of Justice, where the application of the Department's prosecutive standards would alleviate much of the unfairness which attends present applications of the statute.

B. Removal of the Special Prosecutor

The Special Prosecutor provisions place the power to remove a Special Prosecutor in the Attorney General. The grounds for removal, however, differ significantly from those applicable to the Attorney General's removal of other prosecutors and Department of Justice officers. The principal ground for removal is that of "extraordinary impropriety" by the Special Prosecutor. This has the practical effect of negating that supervisory authority that the Attorney General would normally exercise over federal prosecutors. We believe that the grounds should be amended to permit removal for "good cause," the standard applicable to removal of officers of so-called "independent" agencies. Although the precise limits of the "good cause" standard have not been fully established, the temporary Special Prosecutor would, under such a standard, at least be no more "independent" than, for example, the commissioners of the Federal Trade Commission. A serious departure from normal Department practices in the determination whether to prosecute might not amount to an "extraordinary impropriety;" yet proper supervision by the Attorney General would require removal for such conduct. The amendment that we propose would recognize this supervisory power.

C. Covered Persons

One problem with the present statute is the extreme overbreadth of its coverage. Instead of focusing solely on cases which reasonably present some danger of a conflict of interest, the great majority of situations covered by the Act present not even a remote possibility of a conflict. Probably the clearest example of overbreadth in the statute is the unnecessarily large number of people covered by its provisions. Pursuant to Section 591(b), those covered include the President, Vice President, all cabinet members, the dozen or so highest Justice Department officials, the heads of the CIA and IRS, approximately 50 to 100 employees of the Executive Office of the President working above a certain salary level and high officials of the President's election committee. In addition, individuals remain covered after they leave any of these covered positions until a President from a different party is elected. At the end of the Carter administration, there were close to 200 people covered by the statute. Had President Carter been reelected, that number could well have doubled in four years.

The implications of being covered by the Act are significant. The triggering mechanism provides for a preliminary investigation whenever there is "specific information" of a crime. Since this standard does not take into account the credibility of the informant or his information, it subjects covered individuals to the extreme expense and stigma of a criminal investigation under circumstances when non-covered

individuals would often not be investigated. Particularly where a Special Prosecutor is ultimately appointed, the negative publicity and expense can be staggering regardless of whether an indictment is returned, or even whether the Department would routinely decline cases against non-covered people. In addition, the Act often causes scarce investigative and prosecutive resources to be expended on cases which might not otherwise warrant attention. The tremendous amounts of time and money expended on the Hamilton Jordan investigation illustrate this phenomenon. Given this substantial cost to both individuals and the Department whenever the Act is triggered, it would seem desirable to narrow the coverage of the Act to positions which present a more realistic possibility of a conflict. In order of priority, the following categories should be eliminated or reduced:

1. Section 591(b)(3) covers all individuals working in the Executive Office of the President at a rate of pay not less than Level IV of the Executive Schedule. In the Carter administration, this group included scores of Presidential and Vice Presidential staff employees, as well as numerous officials of the Office of Management and Budget, the Council on Environmental Quality, the Council of Economic Advisors and the Council on Wage and Price Stability. With the possible exception of the very highest Presidential aides, there is little or no reason to include any of the other individuals within the Act's coverage. The positions covered by this subsection have virtually no influence of any kind over Department of Justice decisions and there is no reason to assume any close personal or professional tie with Department officials.

The only conceivable reason to include this group under the Act is that they are part of "the Administration" and because criminal charges against them could somehow embarrass the administration, the Department's judgment might be skewed for political reasons. Given the remote relationship most of these people have with the Department, this possibility is simply too speculative to warrant the rather extraordinary measures established by the Act. For the few people in this category where a conflict might reasonably exist, they could be covered by the proposed catch-all group set forth below.

2. Section 591(b)(5) provides that all covered people remain covered "during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President." Under this provision, an individual can remain covered by the Act for as long as 15 years after he left office. As a practical matter, the danger of a conflict involving a former office holder is particularly attenuated. The very few instances where a person's influence or perceived influence persists after he leaves office can be covered by the catch-all provision proposed below.

In addition, there is little reason to continue coverage where a President is replaced by someone of his own party unless there was no break in administrative continuity -- such as where a President fails to complete a term and is replaced by the Vice President who does not overhaul the Cabinet. Where a new President is elected, however, even

of the same party, there is no reason to assume any overriding loyalties toward the departing administration.

A final problem with the duration of the present Act's coverage centers on the fact that many covered individuals remain on the job a few weeks or months under a new administration until they are replaced. A current example is former Deputy Attorney General Renfrew, who remained in his position approximately two months after President Reagan took office. Once out of office, there is no reason whatsoever why such people, generally of a different party affiliation, need be covered by the Act. Under present interpretation he would remain covered as long as President Reagan and any Republican successor remains in office. The wording of the proposed modifications would eliminate this problem.

3. Section 591(b)(6) provides for the Act to cover "any officer of the principal national campaign committee seeking the election or reelection of the President." Given the Watergate related background of this statute, it is understandable why this group was included. The problem with this provision as presently worded is that it fails to enumerate the included "officers." There are probably scores of people with official sounding titles in a major Presidential campaign — certainly not all should be covered. Given the difficulty limiting the term "officers" and given the fact that many of the most influential campaign officers are often appointed to, or come from, covered positions, this category is sufficiently covered by use of the proposed catch-all.

4. Section 591(b)(2) covers incumbent cabinet officers. This category can present appearance problems; however, the problems of a real conflict are virtually nonexistent. Other cabinet agencies function under a wholly different chain of command than the Department of Justice. Thus, there is no reason to subject this category to the Special Prosecutor Act. Where an investigation involves close personal relations within the chain of command, the proposed catch-all provision can be employed.

5. Catch-all. As explained above, the coverage of the present statute is, in many respects, overbroad. Yet in one very important respect it is arguably under-inclusive. Experience has shown that the target of a federal criminal investigation can be someone close to the President or Attorney General (e.g., relative, business associate, friend) yet not be covered by the statute. In such cases, the appearance problems are often more aggravated than those presented in the majority of situations now covered by the Act. At present, the Attorney General cannot employ the statutory Special Prosecutor procedures unless a covered person is directly involved.

Some of the early drafts of the Special Prosecutor Act did have a catch-all provision to cover these contingencies. It was eliminated, however, at the last minute. There is, nonetheless, a need for such an "escape valve" when the Attorney General feels the appearance problems are great but the case is not otherwise covered. The use of non-statutory special counsels (e.g., Paul Curran for the so-called Carter warehouse investigation) meets this need to some extent, but as

long as efficient, credible machinery exists for non-partisan appointments of Special Prosecutors, such machinery should be available whenever the Attorney General believes independent prosecution is warranted.

A catch-all provision, such as set forth below, not only allows for Special Prosecutor coverage where the present Act does not, it can also serve to narrow some of the presently overbroad categories as outlined above. To the extent one believes the catch-all leaves too much discretion in the Attorney General, the provisions of Section 595 of the Act provide ample oversight of this discretion.

In sum, the statute should be amended to cover explicitly only the incumbent President, Vice-President, and Attorney General. In addition, the statute should include a catch-all provision which would cover any other government official, or private person, regardless of position where, because of a close familial, personal, business or political relationship, the Attorney General determines that it would create a significant appearance of conflict of interest if such person were investigated criminally by the Department of Justice.

D. Triggering Information

Section 591(a) of the statute requires the Attorney General to conduct a preliminary investigation whenever he receives "specific information" that a covered person "has committed a violation of any Federal criminal law other than a violation constituting a petty offense." The Department of Justice has encountered two distinct problems in construing and applying this standard.

1. The term "specific information" has proven to be particularly imprecise and has required that a common sense, case-by-case approach be taken. The standard being applied in this case-by-case approach requires that the incoming information and reasonable inferences arising therefrom, if true, would constitute a federal offense. This means that each element of an offense must be met by the facts provided and reasonable inferences arising from these facts. While this interpretation has greatly facilitated a fair, uniform process of analyzing allegations, a persistent problem is presented by the apparently deliberate aim of the drafters to remove any assessment of credibility from the triggering process. Thus, a sufficiently specific allegation may trigger the Act even when it comes from a source that is inherently incredible and the allegation itself is indisputably incredible. Congress apparently assumed that such matters could be disposed of very quickly with a few brief inquiries, but this is not always the case. Often a patently incredible allegation requires extensive investigation to disprove. Even where relatively little investigation is required, it is wasteful of scarce resources and unfair to highly vulnerable reputations to conduct a criminal investigation predicated on a clearly incredible allegation.

2. The present law is triggered by information of <u>any</u> federal crime other than a petty offense. The Department recommends that the Act be amended to require the appointment of a Special Prosecutor only

upon allegations of the commission of a federal felony. Furthermore, there are scores of federal crimes which, because of their lack of aggravation or difficulty of enforcement, are rarely if ever prosecuted. An example would be a technical regulatory offense. With many of these generally unenforced laws, reported violations are not investigated absent some extraordinary circumstances. As worded, the statute appears to subject covered individuals to investigation and possibly prosecution for crimes for which other citizens are not generally sanctioned. Not only is this unfair to the covered individuals, it is extremely wasteful of the limited federal law enforcement resources. The amount of time and money spent investigating an allegation of a single use of cocaine by a White House aide was enormous. It is highly doubtful whether any federal investigation would have occurred if the allegation had been against a non-covered person.

Accordingly, there must be some mechanism for weeding out non-prosecutable offenses from the coverage of the statute. This can be accomplished by limiting the coverage of the statute to allegations of the commission of a felony, and further, by requiring adherence to the Department's normal prosecutive standards. The increase in both fairness and efficiency resulting from such a change would be overriding.

E. Conformance with Department of Justice Standards

An additional means of insuring fairness in the application of the statute would be to impose on the Special Prosecutor the obligation, enforceable by the removal power under the standard of good cause, to adhere to accepted policy within the Department of Justice regarding prosecutorial decisions. For example, we do not believe that the Special Prosecutor should have the unbridled discretion to seek an indictment of an official covered by the Act for an offense which, if committed by someone not covered by the Act under similar circumstances, would not normally lead to indictment.

The purpose of the Act is to ensure that violations of the criminal law which would ordinarily be within the prosecutorial policy are not excused or prosecuted differently because of the special position occupied by the accused official vis-a-vis the President and the Attorney General. This rationale provides no basis for prosecuting high-level officials under circumstances that would not result in prosecution but for the position occupied by the official. Thus, we believe that a persuasive argument can be made that the constitutional doubt surrounding the restriction on removal of the Special Prosecutor would be ameliorated by expanding the removal power to allow effective supervision of a Special Prosecutor through imposition of substantive standards normally applied by the Department. Additionally, adherence to Department standards would reduce the unfairness inherent under the Act of prosecution simply because of the official's position.

Section 594(f) of the statute presently requires a Special Prosecutor to conform to Department of Justice policies only "to the extent that such Special Prosecutor deems appropriate." The Department

believes this section should be amended to eliminate the above-quoted proviso.

F. Preliminary Investigation

After conducting a number of preliminary investigations pursuant to 28 U.S.C. 592, we believe there are two aspects of the statute that should be modified. The first deals with the time period; the second with the description of the preliminary investigation.

1. The statute permits the Attorney General 90 days to conduct a preliminary investigation. If the investigation is not complete, he must seek a Special Prosecutor. Although most preliminary investigations can be completed well before 90 days, there will be some where additional time could serve to obviate the need for a Special Prosecutor. As a practical matter, the full 90-day period is not available for investigation. There are often unavoidable delays in initially identifying and transmitting the allegations, in locating witnesses and in obtaining documents. Particularly when each matter must be reviewed and analyzed personally by the Attorney General it is often necessary to complete the investigation and paperwork well before the 90 days expire so the Attorney General has the opportunity to review the matter and make changes. In order to avoid the danger of a Special Prosecutor being appointed simply because there was insufficient time to complete the preliminary investigation, the Act should be amended to remove the 90-day requirement and instead to provide that preliminary investigations should be conducted expeditiously.

2. There is nothing explicit in the statute limiting the scope of the "preliminary investigation." The legislative history indicates an intent to preclude immunities, plea bargaining and possibly use of the grand jury during a preliminary investigation. It is obviously important to preserve for the Special Prosecutor all possible options in pursuing a matter within his jurisdiction. With nothing in the statute explicitly limiting the options of the Attorney General in the conduct of the preliminary investigation, the possibility for abuse or at least confusion exists. The statute should be amended to make explicit what the Department has been doing voluntarily; namely, precluding any use of immunities, plea bargains or grand jury work in the preliminary investigative process.

I trust the foregoing is helpful to this Committee. I stand prepared to answer any questions you may have.

ATTACHMENT

Office of the Attorney General
Washington, D. C. 20530

April 17, 1981

Michael Davidson, Esquire
Senate Legal Counsel
1413 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Davidson:

I am writing in response to your inquiry with respect to the position of the Department of Justice in Kraft v. Gallinghouse, Civil Action No. 80-2952 (D.D.C.), in which the plaintiff challenged the constitutionality of the Special Prosecutor Act, 28 U.S.C. §§ 49, 591-598 (Supp. II 1978). I have withheld this response during the pendency of the Kraft litigation because I believed it inappropriate to comment extra-judicially upon a pending action in which the Department of Justice is neither a party nor counsel to the defendant, Special Prosecutor Gerald J. Gallinghouse.

As you know, Judge Parker has now dismissed the action as moot in light of the special prosecutor's decision not to prosecute Mr. Kraft. Although the Department of Justice will have no opportunity to present its views to the court, I believe that Congress should be made aware of the Department's position at this time.

The Department of Justice frequently expressed its opposition to the various special prosecutor bills while those bills were being considered by Congress. A number of Department representatives, including Acting Attorney General Robert Bork, Attorney General Edward Levi, and Deputy Attorney General Harold R. Tyler, Jr., expressed the view that such bills would impermissibly intrude upon the Executive's constitutional duty to "take Care that the Laws be faithfully executed." Art. III, § 3. A variety of Department spokesmen expressed reservations concerning the appointment and removal mechanisms of various provisions which were proposed during the 93rd, 94th and 95th Congress. While the opinions expressed have not been identical because they were offered in response to a wide array of proposals, a consistent concern has been articulated with respect to the intrusion made by this type of provision into the powers and responsibilities of the Executive branch.

After a careful review of the Act within the Department of Justice and an analysis of its practical effect over the past few years, I have serious reservations concerning the constitutionality of the Act. In some or all of its applications, the Act appears fundamentally to contradict the principle of separation of powers erected by the Constitution. The power to enforce the law and to prosecute federal offenses is committed by the Constitution to the Executive branch. Indeed, the courts have generally recognized that the prosecution of federal offenses is an executive function within the exclusive prerogative of the Attorney General, and, ultimately, the President. For that reason federal prosecutors must be accountable to the President or the Attorney General. The Special Prosecutor Act removes the responsibility for the enforcement of federal criminal laws from the Executive branch and lodges it in an officer who is not appointed by, accountable to, or save in extraordinary circumstances, removable by the Attorney General or the President.

If the Department's position is sought in future litigation, we would espouse views consistent with the above and addressed to the specific facts of the case. I should also, however, make it clear that until there is a statutory change or a judicial declaration of unconstitutionality, the Department of Justice will continue to comply with the current requirements of the Special Prosecutor Act.

Sincerely,

William French Smith
Attorney General

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

June 1, 1982

Honorable William S. Cohen
Chairman, Committee on
Governmental Affairs
Subcommittee on Oversight of
Government Management
United States Senate
1251 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to supplement the record of the April 28, 1982 hearing concerning S. 2059, a bill to amend the special prosecutor provisions of the Ethics in Government Act of 1978. I would like to set forth the Department's views concerning an issue raised during the hearing.

As you know, the Department contends that the mandatory special prosecutor provisions institutionalize mistrust of the Attorney General and the Department as a whole by requiring the appointment of a special prosecutor in certain cases or for certain individuals. We have suggested legislation which would permit the Attorney General, in his discretion, to appoint a special prosecutor whenever he determined that Department of Justice investigation would create a significant appearance of a conflict of interest.

At the hearing on S. 2059, Senator Levin referred to a statute which requires judicial officers of the United States to "disqualify" themselves in certain specified circumstances. See 28 U.S.C. § 455. Senator Levin argued that the special prosecutor provisions, regulating the conduct of the Attorney General and his subordinates, are no more damaging to the credibility of the Attorney General than existing section 455 is to that of judicial officers. In effect, Senator Levin suggested that section 455 provides a precedent for Congressional action regulating in a very detailed fashion the conduct of officers of the other Branches of government.

We have now studied section 455 and we believe Senator Levin's analogy to be inapt. Unlike the special prosecutor provisions, section 455 merely establishes a rule of personal recusal for a particular judge in a particular case. If the judge must disqualify himself, the case would be adjudicated by another judge of the same Branch of government and, usually, of the same court. Such rules

governing personal recusal already exist in substance for the Attorney General and his subordinates. See 28 C.F.R. § 45.735-1 et seq.

By contrast, the special prosecutor provisions do not simply specify circumstances under which the Attorney General must recuse himself in favor of one his subordinates. The special prosecutor provisions are far broader than section 455 because they conclusively presume the disqualification of an entire Department of government and all its employees. Furthermore, they establish an alternate system for investigating and prosecuting federal crimes.

The judicial recusal provisions in 28 U.S.C. § 455 and the special prosecutor provisions deal with different problems and do so in different ways. Section 455 does not mandatorily disqualify or imply mistrust of an entire Branch of government. The special prosecutor provisions, on the other hand, disqualify the entire Department of Justice, and leave no regular Department official the authority or discretion to handle a particular case. The special prosecutor provisions and section 455 would be analogous only if either (1) the special prosecutor provisions permitted personal recusal of particular Department officials in particular cases (something already accomplished in substance by 28 C.F.R. § 45.735-1 et seq.) or (2) section 455 established "special courts" of some type for handling cases in which any judge of the court were disqualified.

I respectfully request that this letter be made part of the record as an addendum to my testimony.

Very truly yours,

Rudolph W. Giuliani
Associate Attorney General

cc: Honorable Carl Levin
Honorable Warren Rudman
Honorable Thomas F. Eagleton

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